154 U.S. 1 (874)

15-4-1

RECORD, CASE No. 13,92[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 290. 57

FRANK J. PEMROSE, PLAINTIFF IN ERROR,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED NOVEMBER 19, 1892.

RECORD, CASE No. 13,923.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 290.

FRANK J. PRIMROSE, PLAINTIFF IN ERROR,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and proof of service of same	2	1
Caption	3	2
Summons	5	2
Marshal's return	6	3
Narr.	8	3
Pleas	16	6
Replication	20	7
Order for jury, &c.	21	7
Verdict	21	8
Judgment	22	8
Bill of exceptions	23	8
Evidence for plaintiff	24	9
Testimony of Frank J. Primrose	24	9
William B. Toland	37	14
Dr. Charles N. Schollenberger	87	36
Frederick L. Scott	92	38
Frank J. Primrose (recalled)	108	43
Plaintiff rests	145	61

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1893.

	Original.	Print.
Defendant moves for nonsuit	145	61
Ruling by the court	145	61
Further evidence for plaintiff	149	62
Copy of original message, with all matter contained on the face of the blank	150	62
Copy of matter contained upon the back of the original message, form, or blank	151	63
Copy of message received by W. B. Toland, with all matter upon face of the blank	153	64
Deposition of S. T. Stevens	154	64
E. M. Smith	161	68
Colloquy between court and counsel	166	70
Opinion of Judge Butler	170	71
Colloquy between court and counsel	175	73
Charge to the jury	177	74
Judge's certificate	178	74
Bond on writ of error	180	74
Clerk's certificate	182	75

1 UNITED STATES, *Eastern District of Pennsylvania,* } *sct:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between Frank J. Primrose, a citizen of the State of Pennsylvania, plaintiff, and The Western Union Telegraph Company, a corporation of the State of New York and a citizen thereof, defendant, in a plea of assumpsit, a manifest error has intervened, to the great damage of the said Frank J. Primrose, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 22nd day of June, A. D. one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the said United States.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To the Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Frank J. Primrose — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 8th day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

WM. BUTLER, *Judge.*

Service of this citation is hereby accepted for the defendant, and the clerk of the Supreme Court of the United States is hereby authorized and requested to enter my appearance for The Western Union Telegraph Company, defendant in error therein.

SILAS W. PETTIT.

Philada., Nov. 11, '89.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

FRANK J. PRIMROSE, a Citizen of the State of Pennsylvania,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a Corporation of the State of New York and a Citizen Thereof.
} No. 65. Oct. Sess., 1887.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1887, No. 65.

It is thus contained:

Be it remembered that on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and eighty-
4 eight, Frank J. Primrose, by his attorneys, Joseph de F. Junkin, Esquire, and George Junkin, Esquire, comes into court here and sues forth therefrom a writ of summons against the Western Union Telegraph Company, which, with the endorsement and return thereto, is in the words and figures following, to wit:

5 UNITED STATES,
Eastern District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon The Western Union Telegraph Company, a corporation of the State of New York and a citizen thereof, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of February next, to answer to Frank J. Primrose, a citizen of the State of Pennsylvania, in a plea of case; and have you then — there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this
[SEAL.] 25th day of January, A. D. 1888, and in the 112th year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

6 [Endorsed:] No. 65. Circuit court, October session, 1887. Primrose *vs.* Western Union Telegraph Co. Summons. Case. Returnable on the first Monday of February next. Joseph de F. Junkin, George Junkin, attorney- for plaintiff. Filed Feb. 6, 1888.

January 30, 1888, at Philadelphia, in my district, served the within summons on the within-named The Western Union Telegraph Company by giving a true and attested copy thereof to W. B. Gill, superintendent of said telegraph company, and making known the contents of the same.

So answers—

A. H. DILL, *U. S. Marshal*,
Per GEO. W. PAINTER, *Deputy*.

7 And afterwards, to wit, on the 28th day of February, A. D. 1888, the plaintiff, by his attorneys, Joseph de F. Junkin and George Junkin, Esquires, comes into court here and files his *narr.*, which, being read, is as follows, to wit:

8 In the United States Circuit Court for the Eastern District of Pennsylvania.

FRANK J. PRIMROSE, a Citizen of the State of Pennsylvania,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a Corporation of the State of New York and a Citizen Thereof.

No. —, of October Sessions, 1887.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, } *ss:*

The Western Union Telegraph Company, a corporation of the State of New York and a citizen thereof, was summoned to answer Frank J. Primrose, a citizen of the State of Pennsylvania, of a plea of trespass on the case, &c.

And thereupon the said Frank J. Primrose, by Joseph de F. Junkin and George Junkin, Esquires, his attorneys, complains—

1. For that whereas heretofore, to wit, upon the sixteenth day of June, A. D. 1887, the defendant was engaged in the business of forwarding or transmitting telegrams for all persons who should engage its services for the purpose for reasonab-e hir- or reward, to wit, at the city and county aforesaid, and as such was in duty bound carefully and truly to transmit and deliver to the person to
9 whom such telegrams might be directed all telegrams received by it for transmission; and being so engaged in business and so holding itself out to the public upon the day and year aforesaid, to wit, at the county aforesaid, it did receive from the plaintiff a certain message to be transmitted and delivered to one W. B. Toland, which said message was as follows, to wit: "June 16, 1887.

To W. B. Toland, Waukeeney, K's: Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases. Frank J. Primrose"—and the defendant did thereby become bound in law carefully and truly to transmit and deliver the said message; yet the said defendant, not regarding its duty in that behalf, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would carefully or truly transmit and deliver the said message to the said W. B. Toland on behalf of the said plaintiff, but, on the contrary thereof, it, the said defendant, so carelessly and negligently conducted itself in the premises that by and through the carelessness, negligence, and default of the defendant in the premises the said message was not carefully and truly delivered to the said W. B. Toland, but as and for the said message it did deliver to him a message as follows, to wit: "June 16, 1887. W. B. Toland, Waukeeney, K's: Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase. Frank J. Primrose."

10 Whereby the plaintiff was greatly damaged, to wit, in the sum of one hundred thousand dollars, and therefore he brings his suit, &c.

2. And for that whereas also, to wit, upon the day and year aforesaid, to wit, at the county aforesaid, whilst it, the said defendant, was engaged in forwarding, transmitting, and delivering telegrams for all persons who should engage its services for that purpose and as such was in duty bound to transmit and deliver all telegrams received by it, and being so engaged, to wit, at the county aforesaid, it did receive from the plaintiff a certain other telegram, to wit: "June 16, 1887. To W. B. Toland, Waukeeney, K's: Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchase. Frank J. Primrose"—yet the said defendant, not regarding its duty in that behalf, did not carefully and truly transmit the said telegram to W. B. Toland, but did so carelessly and negligently conduct itself in the premises that the said message was not delivered to him, but in place thereof it did deliver to him a message as follows: "June 16, 1887. W. B. Toland, Waukeeney, K's: Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase. Frank J. Primrose."

Whereby the plaintiff was greatly damaged in this, to wit: The said message or telegram so sent by him as a cipher telegram, by means of which, according to an understanding and agreement theretofore made between himself and the said W. B. Toland,

11 who was his employé, ce-tain words therein used had a meaning different from their ordinary meaning, and whereby the real meaning of the said telegram as originally given by him to the defendant for transmission would have conveyed to the said W. B. Toland, if carefully and truly transmitted and delivered, the following message: "Yours of the fifteenth received; am exceedingly busy. I have bought all kinds, five hundred thousand pounds; perhaps we

have sold half of it; wire when you do anything; send samples immediately, promptly of purchase;" whereas the said message, as so carelessly and negligently transmitted and delivered by the defendant to W. B. Toland, conveyed to him from the plaintiff the following message, to wit: "Yours of the seventeenth received; am exceedingly busy; buy all kinds, five hundred thousand pounds; perhaps we have sold half of it; w-re when you do anything; send samples immediately promptly of purchase," and in obedience to the said telegraphic message, as delivered to him by the defendant, the said W. B. Toland, as the plaintiff's agent, forthwith proceeded to buy wool (that being the article or merchandise in which the plaintiff was dealing and in the purchase and sale of which the said W. B. Toland was acting for him), and in a very short time the said plaintiff's agent had purchased for him over four hundred thousand pounds of wool at various prices, in accordance with the instructions contained in the telegram as wrongfully by the defendant to said agent delivered, the prices agreed to be given by
12 him being the current market prices for wool in that portion of the country, but the same being in excess of the sums which could be obtained for it in the market in the Eastern States, where the plaintiff was dealing and for which market it was purchased by the said W. B. Toland and to which it was shipped to the plaintiff by him. Deposits in cash on account of such purchases were made by the said Toland on behalf of the plaintiff with the sellers of such wool in a large amount, to wit, the sum of twenty-six hundred dollars. As the wool was shipped by the sellers, drafts drawn by them upon the plaintiff were attached to the bills of lading and sent to him, which drafts he was compelled to pay. When the wool came it was found to have cost more than it could be sold for in this market, and the plaintiff was unable to carry the same and was compelled to dispose of it at a great loss, which loss was so large that all the stock — by him had to be forced upon the market and also disposed of at a loss, with the result that he was forced into insolvency. All of his outstanding contracts were bro-en by reason thereof, including a number of the aforesaid contracts made by the said W. B. Toland in obedience to the telegraphic message received by him as aforesaid; an- the plaintiff, although entirely solvent and carrying on a large and prosperous business before the sending of the said telegram and its wrongful and negligent transmission to
13 his agent, by means thereof and of such negligence and carelessness on the part of the defendant has not only suffered the afore-aid actual money losses in the forfeiture of his advances aforesaid, in the loss incurred upon the sales of the wools purchased by his agent in consequence of said erroneous transmission of said telegram, and in the forced sales of his other merchandise, but has also been forced into a state of hopeless and irretrievable insolvency, has lost his entire property and business, and is still liable to suits for damages by reason of the broken contracts made by his said agent in consequence of said negligently transmitted message.

And by means of which the said plaintiff has been greatly dam-

aged, to wit, in the sum of one hundred thousand dollars, and therefore he brings his suit, &c.

JOSEPH DE F. JUNKIN,
GEORGE JUNKIN,
Per J., *Att'ys for Pl'ff.*

Feb'y 28, 1888.

14 Endorsed: No. 65. Oct. sessions, 1887. U. S. C. C., E. D. of Pa. Frank J. Primrose *vs.* The Western Union Telegraph Company. *Narr.* Please enter rule upon the defendant to plead in 8 days of judgment *sec reg.* J. de F. Junkin, George Junkin, per J., for pl'ff. Feb'y 28, '88. Filed Feb. 28, 1888. Samuel Bell, clerk. Joseph de F. Junkin, George Junkin.

15 And afterwards, to wit, on the 7th day of March, A. D. 1888, the defendant, by its attorneys, Messrs. Read and Pettit, files its pleas as follows, to wit:

16 Circuit Court of United States, October Sessions, 1887.

PRIMROSE
vs.
WESTERN UNION TELEGRAPH COMPANY. } No. 65.

The defendant pleads not guilty.

And for a further plea in that behalf the said defendant, by leave of the court first had and obtained, says that it ought not, etc., because it says that, in and by the contract between the said defendant and the said plaintiff, under which the message set forth in the plaintiff's declaration in this cause filed was sent, it was agreed between the said plaintiff and the said defendant as follows:

"To guard against mistakes or delays, the sender of a message should order it repeated—that is, telegraped back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of this message and this company that said company shal- not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor
17 in any case for delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message- to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at the following rates, in addition to the usual charges for repeated messages,

viz., one per cent. for any distance not exceeding 1,000 miles and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

18 That the message set forth in the plaintiff's declaration was an unrepeated message and also a cipher and obscure message, all which the said defendant is ready to verify; wherefore the said defendant prays judgment whether the said plaintiff ought to have and maintain its aforesaid action against it.

READ & PETTIT,
Att'ys for Def't.

Endorsed: 65. Oct. sess., 1887. C. C. U. S. Primrose *vs.* Telegraph Co. Pleas. Filed Mar. 7, 1888. Samuel Bell, clerk. Read & Pettit.

19 And afterwards, to wit, on the 16th day of March, A. D. 1888, the plaintiff, by his attorneys, files his replication, which, being read, is as follows, to wit:

20 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

FRANK J. PRIMROSE, a Citizen of the State of Pennsylvania,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, &c.
} No. 65. October Sessions, 1887.

The plaintiff replies:
1. Issue.
2. *De injuria.*

JOSEPH DE F. JUNKIN,
GEORGE JUNKIN, *Pro Plaintiff.*

Endorsed: 65. Oct. sess., 1887. U. S. D. C., E. D. of Pa. Primrose *vs.* West. Union Tel. Co. Replication. Filed Mar. 16, 1888. Samuel Bell, clerk. J. de F. Junkin, George Junkin.

21 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the 9th day of April, A. D. 1889, come the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit:

Levi W. Groff, Benjamin F. Riegel, William F. Donaldson, Francis Stokes, Thomas A. Robinson, William H. Stewart, Edward Thomas, Samuel T. Child, William B. Warne, Israel F. Gross, Charles McIntire, John C. Gehly, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, on the 16th day of April, A. D. 1889, the jurors aforesaid on their oaths or affimations aforesaid respectively do say that they find for the defendant.

22 And afterwards, to wit, on the 28th day of May, A. D. 1889, the court orders judgment to be entered on the verdict in favor of the defendant and against the plaintiff.

Whereupon judgment is entered accordingly.

And afterwards, to wit, on the 26th day of April, A. D. 1889, the plaintiff, by his attorneys, files the following bill of exceptions, to wit:

23 In the United States Circuit Court for the Eastern District of Pennsylvania.

FRANK J. PRIMROSE, a Citizen of the State of Pennsylvania, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, a Corporation of the State of New York and a Citizen Thereof.	No. 65. October Sessions, 1887.

Be it remembered that in the said term of October, A. D. 1887, came the said plaintiff into the said court and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (*pro ut narr.*) and the said plaintiff pleaded (*pro ut* pleas); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Philadelphia before the Honorable William Butler, a judge of the said court, on Tuesday, the ninth day of April, A. D. 1889, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled (*pro ut* list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affimed to try the said issue; and upon the trial the counsel of the said plaintiff called as a witness on behalf of the plaintiff—

TUESDAY, *April 9th*, 1889.

Present: Messrs. Junkin and Junkin, for plaintiff; Silas W. Pettit, Esq., for defendant.

FRANK J. PRIMROSE, having been duly sworn, was examined as follows:

By Mr. JUNKIN:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Where do you reside?
A. In Chicago.
Q. How long have you been in Chicago?
A. Since the first of January of this year.
Q. Where did you reside before that time?
A. Until last summer in Philadelphia.
Q. Last summer you went where?
A. To Denver last September.
Q. Previous to that time you had been in Philadelphia?
A. Yes, sir.
Q. How long had you lived in Philadelphia?
A. All my life up to that time, except the time I had been away on short trips.
Q. What business were you in in June, 1887?
A. In the wool business, buying and selling.
25 Q. How long had you been in that business?
A. For myself since 1879, on my own account.
Q. From 1879 to 1887 you were in the business for yourself, buying and selling wool, in Philadelphia?
A. Yes, sir.
Q. Prior to that time how long had you been in the wool business?
A. From 1874.
Q. In the employment of some one else?
A. Yes, sir.
Q. In whose employ were you?
A. I started with Bettle & Bro., and remained with them, in fact, until the time I went in business for myself.
Q. They are wool merchants in Philadelphia?
A. Yes, sir; they were at that time. They went out of business in 1884.
Q. Have you had any other experience besides that which you have given us in the wool business?
A. No, sir; but that I have had since 1874?
Q. You have bought and sold wool all over the country?
A. Yes, sir.

Q. With your own capital?
A. Yes, sir.
Q. You bought wool where, generally?
26 A. For the last few years I bought it almost exclusively in Colorado, New Mexico, and Wyoming, perhaps, some.
Q. In the Western States, in the wool-growing districts?
A. Yes, sir; some also in Texas.
Q. Where did you sell it?
A. Anywhere that I could; some points West; principally through the East; near-by points to Boston; some here in Philadelphia; some in New York; anywhere where I could find a market for it. By the way, a portion of that time in business I was located at Colorado Springs one summer.
Q. Buying and selling wool there?
A. Yes, sir; I had at that time no office in Philadelphia, but I think that was only the one year.
Q. In 1887, in the month of June, did you make any preparations to buy wool in the West?
A. Yes, sir.
Q. What were they?
A. I had made the usual preparations by correspondence with all the people that I had heretofore dealt with, and in addition to that I had determined to send Mr. Toland to a district that he had been familiar with in Colorado and through Kansas, with instruc-
27 tions to buy 50,000 pounds; then to wait until he had heard further from me; if I had been able to find a market for that 50,000, then he could go in and buy another 50; or, in other words, to abide by my instructions. That was the understandiug.
Q. Who was Mr. Toland?
A. Mr. Toland was employed by me as a buyer or seller or did most anything there was to do.
Q. He had been in your employment how long?
A. I think since 1883.
Q. Had he had previous experience with the wool business?
A. Yes, sir.
Q. Do you know of him personally in that business?
A. I have known of him in the wool business for, I should say, ten years.
Q. Ten years prior to that time or this time, do you mean?
A. Ten to twelve years from this time.
Q. You sent him out when?
A. Early in June. I can't tell you the exact date.
Q. With the instructions that he was to buy 50,000 pounds and wait for further orders?
A. Yes, sir.
Q. Did you receive any notice from him as to his having made purchases?
28 A. Yes, sir.
Q. Up to what extent?
A. 50.000 pounds.
Q. Had you yourself made purchases here in the East?

A. Not in the East. In the West, through my other correspondents.

Q. You had made purchases yourself?

A. Yes, sir.

Q. Up to what extent?

(Objected to.)

(Telegram in question called for by counsel for plaintiff and produced by counsel for defendant.)

Q. Upon June 16th, 1887, did you send a telegraphic message to Mr. Toland?

A. Yes, sir.

Q. (Above referred to message shown witness.) Is that the message?

A. Yes, sir; that is the original message.

Q. Have you seen it from that day to this?

A. No, sir—yes, sir; I did see it at the Western Union office, Broad and Chestnut.

Q. You filled up that blank when?

A. I wrote it at my office, 153 North Front street.

Q. Where did you take it?

29 A. I sent it by—I had a call in the office and called a messenger—to Scott's telegraph office. He was the agent of the company—the Western Union Telegraph Co.

Q. You called a messenger from his office and gave him that paper with the writing upon it and sent it, did you?

A. Yes, sir.

Q. Did you pay for it at the time?

A. No, sir.

Q. Did you pay for it at all?

A. Yes, sir; I had a running account with Mr. Scott, and we settle our bills every month. This, amongst others, including others, was paid for at the end of the month—about the first of the following month; some such time.

Q. What was the bill for that month?

(Objected to.)

A. I don't remember; $180 and odd, I think, or $150 to $180, for that one month at that office.

Q. That bill you paid?

A. Yes, sir.

(Said telegram offered in evidence by counsel for plaintiff, and read.)

Q. You said you wrote that telegram in your office—wrote
30 the message upon that blank. Did you have a lot of blanks or a book or anything like that?

A. I don't remember whether that particular blank came from a book or not. I either had a bunch of them or a book. I rather think that came with a bunch. I kept them conveniently near by in a drawer.

Q. There is upon the back of that paper a lot of printing. Did you read it upon that day?

(Objected to as immaterial.)

A. No, sir.

Q. You say you had a similar lot of blanks in your office?

A. Yes, sir.

Q. Had you ever read the printing upon the back of those blanks?

(Objected to.)
(Objection overruled.)
(Exception by defendant.)

A. I don't remember that I ever did. I have no recollection of it at all up to that time. I have since.

Q. You mean up to the time of this occurrence—up to the time of the bringing of this suit?

A. Yes, sir.

31 Q. You have no recollection, you say, of ever having read those conditions?

A. I have not.

Q. The telegram as it now reads apparently has no meaning. It was a code telegram, was it?

A. It was a code telegram.

Q. (Referring to code book.) Is that your code book?

A. Yes, sir.

Q. Is this a correct translation of that telegram according to your code: "Yours of the 15th received; am exceedingly busy"?

A. It reads, "Your telegram of the 15th received." The word "despot" means "your telegram of the 15th received."

Q. It further reads, "Am exceedingly busy. I have bought all kinds; five hundred thousand pounds. Perhaps we have sold half of it. Wire when you do anything. Send samples immediately, promptly of purchases." Is that correct?

A. That is correct; yes, sir.

Q. How long had you used that code?

32 A. This was a revision. We revised it every year. We had used it; originally we started to use it in 1882.

Q. Who do you mean by "we"?

A. I don't know just who. I had used it.

Q. How long had you used it?

A. From 1882, I should imagine.

Q. Did Mr. Toland have a literal copy of it?

A. Yes, sir.

Q. A book like yours?

A. Yes, sir; just exactly.

Q. You and he had used it since he had been in your employment in 1883?

A. Yes, sir. I had used it prior to his coming with me.

Q. Had you sent any other telegram to Mr. Toland from this same office?

A. Oh, yes; numbers of them.
Q. With this same code?
A. Yes, sir.
Q. During this same month and previous?
A. Yes, sir.
Q. That was when Mr. Toland had been out West at other times?
A. Yes, sir.

Cross-examination.

By Mr. PETTIT:

Q. When was it Mr. Toland went West?
33 A. Early in June. I can't tell you just when.
Q. When did he buy the 50,000 pounds that you had instructed him to buy?
A. I should say about the 10th to the 12th. I can't give you the exact day.
Q. How had he notified you of those purchases?
A. By telegram usually.
Q. Do I understand you to say that your instructions to him were to buy 50,000 pounds and then stop until he got further orders from you?
A. Just exactly.
Q. This telegram that is before you and that is the original you have a press copy of, I think?
A. Yes, sir.
Q. It was written by you in your office?
A. Yes, sir.
Q. Then you called for a boy by the push-bell?
A. I may have sent my own boy down. I can't tell you about that; that was the usual way.
Q. By some messenger you sent it to the office where?
A. Front street below Arch. I can't give you the number.
Q. What company signs were out there?
A. The Western Union, as far as I know.
Q. The amount for that telegram was charged against you?
A. Yes, sir.
34 Q. You say you paid your bills monthly?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir; I have the bill here to show that among my papers.
Q. When did you discover that there had been a blunder about this telegram?
A. Not until Mr. Toland had returned.
Q. When was that?
A. I should say about July 7th or 8th; maybe the sixth. I can't tell you exactly as to the date.
Q. When did you first know of his purchases in consequence of this alleged telegram?
A. I should say within three or four days after he had made them.
Q. About when was that?

A. He started at once. I should suppose about the 20th; somewhere from the 20th to the 25th of June.
Q. When did you pay this telegraphic bill that you speak of?
A. Some time after it was presented—a few days; say in July.
Q. When was it presented?
A. In July. I don't know when.
35 Q. Did you not have a controversy with Mr. Scott about the payment of that telegram?
A. No, sir; never.
Q. Neither then nor at any time?
A. Not that bill. I did the next month's bill.
Q. What was your controversy about it?
A. Simply that I didn't know whether to pay it or not until I knew what you were going to do—what the Western Union people were going to do about the matter.
Q. That was a whole month's bill?
A. The next month's bill. Not the one that this was included in.
Q. How long had you had these blanks in your office?
A. I can't tell you. I was getting them whenever I ran out of them.
Q. Where was your place of business?
A. 153 North Front.
Q. Where was the telegraph company's office?
A. Front street below Arch.
Q. How far off was it from your office?
A. Less than a block—less than a square.
Q. How long had you been at 153 North Front?
A. I think since 1885.
Q. How long had the telegraph office been there before that?
36 A. I can't tell you that. I don't know.
Q. How long had you been in the habit of keeping these blanks?
A. Just as long as I have been telegraphing—as long as I have been in business. I had nothing else. I could not have.
Q. A great deal of your business is done by telegraph?
A. A great deal; yes, sir.

(Bill of Union Telegraph Company dated June 30th, 1887, receipted by Mr. Scott for the company, considered in evidence.)

37 WILLIAM B. TOLAND, having been duly sworn, was examined as follows:

By Mr. JUNKIN:

Q. You are now engaged where?
A. With Charles J. Webb & Company, Front and Race.
Q. You are employed by that firm?
A. Yes, sir.
Q. You have been with them since when?
A. Since the 5th of September, 1887.
Q. They are engaged in the wool business?

A. Yes, sir.

Q. How long have you been engaged in the wool business?

A. Since March, 1871.

Q. When did you become connected with Mr. Primrose?

A. I think it was in the latter part of 1883.

Q. You were employed by him for what purpose?

A. To buy wool principally—that is, in the season and to sell; also to keep the books and be general factotum.

Q. In the season your business was to buy for him whereabouts?

A. In the West.

Q. What experience had you had in buying in the West prior to your going with him?

38 The COURT: That will not be involved in this case.

By Mr. JUNKIN:

Q. You have had experience in the wool business since 1871?

A. Yes, sir.

Q. In the early part of June, 1887, did you leave this city?

A. Yes, sir.

Q. For what purpose and where did you go?

A. I left Philadelphia on the 6th of June, 1887, to go West. My route was to begin in Kansas—the lower section of Kansas—go through South Kansas and then strike up to the Kansas Pacific—that is, the northern section of the State.

Q. What do you mean by your route?

A. After leaving Kansas City I was to have some starting point for operations.

Q. You went out West. What did you do then?

A. I left Philadelphia with the understanding between Mr. Primrose and myself that I was to buy fifty thousand pounds of wool, whether in one clip or several, and then to stop until I had received further instructions from him either by letter or telegram.

39 Q. What did you do in consequence of those instructions after you got out West?

A. After leaving Kansas City I went to several points, finally coming down to the southern part of the State, and then working up at Augusta I made a trade there with one firm of growers.

The COURT: I do not want the jury to suppose that we have anything to do upon any other matter than the question upon which this case turns. You desire to show that he bought to the extent of his authority.

(To the witness:) Did you buy 50,000 pounds of wool or not?

A. I bought 50,000 pounds of wool; then I went up to the Kansas Pacific railroad to reach Waukeney Station, where my mail was to be sent—both my family and the other.

Mr. JUNKIN:

Q. Before you went there had you communicated to Mr. Primrose, either by telegram or by letter, that you had purchased up to the extent of your limit?

A. Yes, sir; both by telegram and letter. I reached Ellis first, twenty miles north of Waukeney, and there I saw one or two growers. I left Ellis by wagon to go to Waukeney, somewhere
40 about one o'clock in the afternoon, and got into Waukeney probably somewhere about five.

Q. Did you leave any message at Waukeney with the telegraph operator?

A. I left word with the telegraph operator at Ellis to send any messages that might come to me there onto Waukeney. I got into Waukeney about five o'clock in the afternoon and saw several parties, and about half past eight in the evening, after I had had supper and was getting ready to take the 8.50 train to go further west, while standing in the hotel office this message was handed me by the hotel clerk.

Q. Do you say about eight p. m.?

A. About that time in the evening.

Q. You received the paper which I now hand you?

A. Yes, sir; I received that telegram.

Q. Was that in a Western Union envelope?

A. To the best of my recollection; yes, sir.

Q. Had you a code book like this?

A. Yes, sir.

Q. It was agreed upon between you and Mr. Primrose?

A. Yes, sir.

Q. Have you got it with you?

41 A. I have it in my overcoat pocket.

(Said telegram offered in evidence by counsel for plaintiff.)

The WITNESS: The code is the same identically as Mr. Primrose has.

Q. Please hold this telegram while I read the translation of it and see if it is correct: "Your telegram of the 17th received. Am exceedingly busy. Buy all kinds; 500,000 pounds. Perhaps we have sold half of it. Wire when you do anything. Send samples immediately, promptly of purchase." Is that a correct translation according to your code of that telegram?

A. Yes, sir.

Q. In consequence of that telegram what did you do?

A. In consequence of that telegram I started in to buy.

Q. What did you buy?

A. I was unable to do anything at Waukeney.

Q. What did you buy?

A. I bought, as near as I can recollect, about from 300,000 to 350,000 pounds of wool.

Q. How long did it take you to buy it?

A. I think I had it all bought by about the 23d of June.

42 (Paper shown witness.)

Q. What is the date of that agreement?

A. June 20th; with Lowry Brothers, near Hugo, Colorado; fif-

teen to seventeen thousand pounds; amount paid in the shape of advance, $200.

Q. What did you agree to pay?

A. Twenty cents.

(Draft shown witness.)

Q. Is that the original draft that you gave Lowry?

A. Yes, sir. There is also a contract with Samuel D. Yoxall, Montaro, Kansas. June 18th, ten to fifteen thousand pounds; price, 21 cents; $100 given as advance. I have also here the draft and the original agreement.

Also one made at Arroya, Colorado, June 22d, with C. Shafer for 25,000 pounds of wool; advance, $100. I have also the draft and the agreement.

Near Hugo, Colorado, June 21st, contract made with Leduc Brothers for ten to twelve thousand pounds of wool at twenty cents, upon which I advanced them $100. I have here the draft and agreement.

Also contract June 13th, at Degraf, Kansas.

43 Mr. PETTIT: That has nothing to do with this case.

The WITNESS: I have also a contract made with a live-stock company of Denver, dated the first of July, for all of its 1887 clip.

Q. Have you any idea as to the quantity of pounds?

A. From eighty to eighty-five thousand pounds.

Q. What did you pay them on account?

A. $1,000. I have here also the draft and the agreement. The price to be paid was 20½ cents.

Also contract dated Hugo, Colorado, June 21st, for fifteen to twenty thousand pounds at twenty cents a pound. I paid them $100. I have here also the draft and the agreement of that and the last-mentioned one.

Also contract made near Hugo, Colorado, June 18th, with Morgan & Orcut for their clip, about 30,000 pounds, more or less, regular wool, twenty cents; bucks at fifteen; black at 17½; delivered on the cars at Hugo Station. I gave them $500 as an advance. I have also the draft and agreement accompanying.

Also contract, made at Sharon Springs, Kansas, June 18th,

44 with James Yoxall for his clip, about 13,000 pounds at 22 cents a pound, delivered on the cars; advance, $100; also agreement and draft.

Also contract with W. T. Holmes, Wallace, Kansas, June 18th, for his clip, about 13,500, more or less, at 20 cents a pound, 15 cents for bucks and black. I paid him $50.

Q. You also made another agreement, did you not, with Sherman?

A. Yes, sir.

Q. What was that and for how much?

A. I made an agreement with Ronald Sherman, of Byers, Colorado, for his clip at 20½ cents a pound all around. I made him no advance.

Q. How much did it amount to?

A. $12,350; 60,000 pounds net. I gave him a draft on the 6th of July, but I made the purchase probably a week earlier than that.

Q. About the first of July?

A. Somewhere about the first of July.

Q. What did you do with that different from the other transactions?

A. He met me at the German National bank in Denver, where I made a settlement with him—that is, I gave him a check
45 on the German National bank as against the account that I had previously opened, and then to cover that check with the German bank I gave the German bank this draft on Primrose for $12,310.63. I have here the original draft.

Q. What did you do with that draft?

A. I gave it to the cashier of the bank.

Q. What did you give him with it?

A. The original bills of lading.

Q. You attached the bills of lading to the draft?

A. Yes, sir.

Q. Have you any means of telling the jury what was the amount of wool that went along with that draft?

A. I have here the duplicates; they are correct. They show, according to the bill that I made out at the time, 60,700 pounds net.

Q. You also did the same thing with another lot of wool, did you not?

A. Yes, sir; with several other lots. I bought a clip of William Clifford at Mirage, Colorado.

Q. What did that cost?

A. I paid him twenty cents.

Q. What was the amount of it?

A. 15,000 pounds, as near as I can recollect now.

46 Q. What did you advance on it?

A. $50. The date of that purchase was after the 17th of June.

Q. Have you a statement as to any other clips?

A. I bought a clip from Wills Brothers, about 8,000 pounds, at about the same price.

Q. (Papers shown witness.) Are these the papers relating to the Wills transaction?

A. Yes, sir.

Q. They show what?

A. 7,800 pounds at 20 cents a pound. I made them no advance. I made a settlement with them in Denver.

Q. How much did you pay them?

A. $1,562.50 in cash.

Q. What became of that wool?

A. It was shipped to Boston, I think.

Q. (Papers shown witness.) What are those papers?

A. That is a purchase from William Clifford, sixth month, 29th—the Mirage purchase—12,000 pounds at 20 cents a pound, $2,432.30.

Q. Did you settle for that in cash?

A. I met him in Denver and gave him a check.

Q. What became of that wool?

47 A. It was shipped to Boston.

Q. What was that for (indicating)?

A. That was a purchase of McDonald at Byers—9,188 pounds of wool at 20 cents, June 24th.

Q. What did you do about that—advance on it or pay for it?

A. Paid for it; gave him a draft on Colorado Springs, $1,828.60.

Q. (Other papers shown witness.) What are those?

A. That is the draft that I gave to James Yoxall—no, I gave that to the German National bank to cover the check that I had sent to James Yoxall for his wool. Accompanying that draft, when given to the Keystone bank, were the original bills of lading. The amount of the draft is $2,631.85. It is dated July 5th.

Q. How did you mark this wool that you bought and shipped to the East?

A. I used a uniform mark—a diamond A, Boston. We did that in order to conceal the identity of the wool either at its destination or sourse.

Q. That was your uniform mark—a diamond A?

A. Yes, sir; a diamond A, Boston.

Q. The prices that you paid for your wool—were they

48 proper or improper prices, according to the market?

A. I considered them proper prices. I considered the wool well bought at the time, considering the condition of affairs in the West at that time.

Q. That is, they were the proper current market prices?

(Objected to as leading.)

Q. Who did you ship those wools to at Boston?

A. I shipped them to order. That was the wording of the bills of lading. "Notify Frank J. Primrose, 153 North Front street, Philadelphia." That was in order to make the drafts negotiable at the bank.

Q. You attached to those drafts the bills of lading?

A. Yes, sir.

Q. That is all you know about that matter personally?

A. Yes, sir.

Q. Do you remember the 16th of June, 1887?

A. Yes, sir.

Q. What character of day was it?

A. A bright, beautiful day; just like it is now, only warmer.

Q. What brings that day specially to your attention?

A. This particular instance and the fact of my having trav-

49 eled across the country in a buckboard wagon for about twenty or twenty-five miles.

Q. You drove from Ellis to Waukeney on that day in an open wagon?

A. Yes, sir.

Q. Did you have a driver, or were you by yourself?

A. I had a driver with me.

Q. You remember it as being a bright, beautiful, sunshiny day?

A. Yes, sir.

Q. What did you do when you bought these various lots of wool from time to time in consequence of this telegram, as far as Mr. Primrose was concerned?

A. I notified him just as promptly as I could—that is, as soon as I could get to a telegraph station.

Q. You had to buy this wool where?

A. I had to go out to ranches sometimes sixty-odd miles across country, away from railroad and telegraph offices.

Q. How far were those various ranches apart from each other?

A. They varied. Some would be within a few miles and some twenty or thirty miles apart.

Q. You drove from place to place?

50 A. Yes, sir.

Q. As I understand you, you got to a telegraphic office from time to time, and as you could you would send off word what you were doing?

A. Yes, sir; notify him what had been done.

Q. Did you receive from him during those few days any messages?

A. In the interval between the 16th an occasional message. I had to travel so rapidly to get over the ground and to accomplish what I imagined I was out there for that I wasn't at any one station for any great length of time.

By the COURT:

Q. What was the first telegram that you sent him after you commenced making these purchases?

A. I think you will find the first is dated the 18th, from some point in lower Kansas.

Q. What was the day you received the telegram?

A. The night of the 16th.

Q. And you telegraphed him on the 18th?

A. Yes, sir; that was the day of my first operation, I think. In fact, I think the contracts here will show that they are dated the 18th.

51 By Mr. JUNKIN:

Q. That is, your first contract was on the 18th?

A. Yes, sir.

Q. I have here a telegram dated 20th June, 1887. That is the first we can find. Do you remember any before that?

A. I have no distinct recollection about it now—about having received any up to the receipt of this one.

Q. Can you tell by looking at it whether that is the first? Do you remember whether you sent any others?

A. I think I sent no telegrams on the 18th. I am not positive about that. This is dated June 20th, from Hugo, Colorado, sixth month, 19th. This was a night message that he got on the morn-

ing of the 20th: "Frank J. Primrose, neither letters nor telegrams from you."

Q. Is that the translation?

A. No, sir; the message is mostly in English, or at least plain language. It reads, "Keep me regularly posted, or impossible to buy." Then the word "bay" comes in there. The translation would be, "I have bought Yoxall clips, 30,000 pounds, 22—Holmes, 14,000—20¼."

52 Q. Here is one of the 18th. Has that anything to do with these purchases?

A. No, sir; this is dated Montaro, Kansas, sixth month, 17th; also a night message to Frank J. Primrose. It reads: "Leave for Hugo to-night." (That was the 17th.) "Disappointed at not hearing from you to-day."

Q. That was just one day after you received that telegram?

A. Yes, sir.

Q. I have here several others—one dated the 21st, one the 22d, and one the 23d.

A. One is dated Hugo, Colorado, June 20: "Your telegram of 20th received. Have bought Orcutt, Hamp, and Laurie 60,000 lbs., 20 cents; all extra choice. Strongly advise these and Yoxalls and Holmes clips be not sold till shipped about July 15th; however, will send samples at once."

Also Hugo, July 21st: "Your telegram of the 21st rec'd. Have bought Fields Ladues 30,000 lbs., 20 cents, and perfect daisies. Will leave here for Araya to-night; Thursday, Byers. Write me care Windsor, Denver. Have cleaned out all choice wools here."

53 Also, sixth month, 22d, Araya, Colorado: "Have bought about 50,000 lbs., 20 cents; 10,000 lbs., 19½ cents. Condition is good; condition is choice. Will ship some early coming week. Have drawn at sight, El Paso Co. bank, 500 dolls. for additional advances. Will leave here for Byers to-night."

Also, Denver, Colorado, sixth month, 22d: "Have bought McDownell 10,000 lbs., 20 cents; Sherman 50,000 lbs., 20½ cents. Ship next week; don't judge on value. Sherman clip by sample sent; ruined by dust storm. Will send samples when shipping. No letters from you for weeks."

By the COURT:

Q. Were those all the telegrams from you during the period referred to?

A. Yes, sir: between the 16th and 22d.

Q. Were all these purchases made between the 16th and 22d?

Mr. PETTIT: No; some of them were in July.

The WITNESS: I wish to give the date of the last message. I identified a bill of Ronald Sherman's a few minutes ago. The draft was dated July 5th. I said I had made that purchase within a week of that date. This gives more correctly the date of the purchase.

54 By Mr. JUNKIN:

Q. What was it?
A. June 22d.

By the COURT:

Q. All your purchases were made between what dates?
A. Between the 16th and 22d, excepting the Holt clip of 85,000 pounds.
Q. When was that made?
A. The papers will show; the contract is here. It is July 1st, I think.

Mr. PETTIT: There was a large purchase made on the 29th of June at Mirage, and another on the 1st of July.

By the COURT:

Q. Did you make that purchase on the 29th of June?
A. The papers will determine that. I can't say from memory. If that was the date of the draft that don't determine the date of the purchase. The name of the party was Clifford & Wills. Those purchasers were made on or about the 22d or 23d of June from Clifford & Wills, at Mirage.
Q. You have no agreement with them in writing?
A. Yes, sir.
Q. You settled with them about the 29th of June?
55 A. Yes, sir.
Q. Where was that settlement made?
A. In Denver, after the purchase; the purchase was made about the 22d or 23d of June.
Q. In the other case, also, you made a settlement after the purchase?
A. Yes, sir—that is, Wills Brothers, and the other is Clifford; that was bought on or about the 22d or 23d of June, at the same point.
Q. On the Holt purchase that you have spoken of you and Mr. Primrose had a number of telegrams about early in July, did you not?
A. Yes, sir; early in July or the latter part of June.
Q. That was the one purchase bought after the 22d or 23d?
A. Yes, sir.
Q. Did you receive from Mr. Primrose any communication after the 16th—between the 16th and 22d or 23d?
A. I think I got several telegrams. I can't tell you now just how many.
Q. Did you keep them?
A. No, sir.
56 Q. (Letter-press copy shown witness.) Do you remember receiving a telegram similar to that from Mr. Primrose?
A. Yes, sir; I recognize that telegram.
Q. When did you receive it?

A. I think I received it on the 21st, at Hugo, Colorado. It was dated Philadelphia, the 20th.

Q. What does it say?

A. "June 20th. William B. Toland, Hugo, Colorado: Telegrams received. Wired you Friday. Can get no encouragement at prices you name, but perhaps you had better buy a few of the choicest clips, especially in Colorado, where we have a reputation to sustain as buyers. Mince."

Q. What does the word "mince" mean?

A. It means, "Wire if you do anything."

Q. Do you remember receiving another telegram from Mr. Primrose, dated June 25th?

A. Yes, sir; I remember this telegram distinctly.

Q. When did you get it?

A. I got it at the Windsor hotel either on the 25th or 26th of June.

Q. Was that the next one that you received?

A. Yes, sir; it reads, "Your telegram 24th received.
57 Wired you last night. Stop buying until further orders. Money very tight. — for full explanation. Answer by wire immediately."

Q. In consequence of that telegram what did you do?

A. I stopped buying.

Q. After that you bought one more clip, after correspondence with Mr. Primrose?

A. Yes, sir; after having had, perhaps, nearly a week's correspondence with Mr. Primrose about it.

Q. What clip was that?

A. The Holt Live Stock clip; 85,000 pounds.

Q. Do you know the aggregate of the amount of your deposits for purchases—how much money you spent upon these various purchases at the time by way of deposit?

A. Including the $1,000 given to Colonel Holt, I advanced altogether about $2,600.

(Objected to.)

Q. The aggregate amount of your purchases was how much?

A. That I can't say; I haven't figured it up; I bought in the interval between the 16th and 22d one clip, upon which I made no advances, amounting to about 20,000 pounds; the wool was not taken.

Q. Did you come on East then, shortly after that?

58 A. Shortly after the 1st of July some time—on the 5th of July.

Q. Having ordered the wools that you had purchased shipped to the East, as you have described?

A. Yes, sir.

Q. When did you first discover the error in this telegram?

A. It wasn't discovered until I arrived in Philadelphia and met Mr. Primrose.

Q. How was it discovered?

A. We were comparing notes upon my return. I showed him the telegram and he claimed that he had never sent it in that shape. He at once got the copy book and showed me the message that he had sent me, with altogether a different meaning.

Cross-examination.

By Mr. PETTIT:

Q. The first purchase that I find here is Montara, Kansas. That is June 18th, 1887.

A. Yes, sir; S. D. D. Yoxall.

Q. That is his clip of ten to fifteen thousand pounds, at twenty-one cents? You paid on that $100?

A. Yes, sir.

59 Q. The next one apparently is dated June 18th, Morgan & Orcutt, at Hugo, Colorado?

A. No; I think there is one there from James Yoxall.

Q. The purchase of the clip from the Holt Live Stock Company was made on the 1st of July, 1887?

A. Yes, sir.

Q. You say that was after correspondence with Mr. Primrose?

A. Yes, sir—that is, telegraphic correspondence.

Q. That telegraphic correspondence is not attached here, is it?

A. I can't say whether it is or not.

Q. Look and state that or whether it has relation only to your dealing with the seller.

A. The telegram attached relates to our non-fulfilling contract entirely.

Q. That is, entirely as between you and the seller and not as between you and Mr. Primrose?

A. These telegrams are sent mainly by the Holt Live Stock Company to Mr. Primrose in Philadelphia.

Q. This purchase had nothing to do with the telegram that you received at Waukeney, had it?

60 A. I can't say that it had. As I say, I had correspondence with Primrose in reference to this particular matter.

By the COURT:

Q. It was after you were requested not to buy without notice?

A. That is the idea exactly.

By Mr. PETTIT:

Q. Where was the Holt wool sent?

A. It wasn't sent anywhere by us. We simply lost the advance. We didn't take it up.

Q. Sharon Springs, Kansas; James Yoxall, 13,000 pounds, about, at twenty-two cents. Is that correct?

A. Yes, sir.

Q. You paid on that $100?

A. Yes, sir.

Q. Next comes Morgan & Orcutt. They were near Hugo, Colorado. The date of that is June 18th.

A. That is a mistake in the date. Apparently I have made a mistake in the date, because the distance between Sharon Springs, Kansas, and Hugo, Colorado, is probably about seventy-five
61 miles, and I got through at Montara, Kansas, where I had bought wool from the Yoxalls on the night of the 18th of June and had to travel all night to get to Hugo, arriving there on the morning of the 19th, and it was on that day that I bought that wool. Come to think of it, the 19th was Sunday. I went out and bought the wool from them on Sunday and dated the contract the 18th.

Q. That is the reason that you dated it back?

A. Yes, sir.

Q. I find here Wallace, Kansas, June 18th. Is that correctly dated?

A. Yes, sir.

Q. That reads, "Twenty cents. 13,500 pounds, more or less." Is that correct?

A. Yes, sir; that was W. T. Holmes. $50 was paid on account.

Q. Did you take that wool?

A. Yes, sir.

Q. Did you take the Yoxall wool?

A. Yes, sir—that is, the James Yoxall wool.

Q. Did you take the other Yoxall wool?

A. No, sir; no settlement was made with him. I made
62 an advance of $100 and we lost that.

Q. The S. D. Yoxall wool you didn't take?

A. No, sir.

Q. The next is June 20th; Laurie Brothers, near Hugo, Colorado.

A. Yes, sir; that was bought on Monday morning. $200 was paid on account.

Q. Did you take that wool?

A. No, sir.

Q. The next is dated June 21st; ten to twelve thousand pounds, at twenty cents, from Laduec Brothers.

A. Yes, sir.

Q. Did you take that wool?

A. No, sir.

Q. I find also June 21st, Mallen & Field, fifteen to twenty thousand pounds at twenty cents; $100 paid on account at Hugo, Colorado. Is that correct?

A. Yes, sir.

Q. Did you take that?

A. No, sir.

Q. Also June 22d, Conrade Shafer, 25,000 pounds, the whole of his clip at Araya, Colorado; $100 on account. Did you take that?

63 A. No, sir.

Q. I find here some papers from L. McDownell.

A. Yes; there are two purchases. They were omitted. There is an explanation of that.

Q. Was that purchased in June or July?

A. It was purchased in June, the 24th of June.

Q. Where?

A. At Byers, Colorado.

Q. Did you go to Byers before or after you went to Denver?

A. I went to Byers before I went to Denver; on my way into Denver.

Q. That is a purchase of 9,098 pounds net at twenty cents?

A. Yes, sir. That wool we took; at least we shipped it.

Q. Did you pay for it?

A. Yes, sir.

Q. You paid these two drafts, did you?

A. I paid Mr. McDownell for the wool by sight draft on the El Paso bank, Colorado Springs, $1,828.60. That is a duplicate
64 bill of lading—diamond A, Boston. That is the Sanford clip (referring to another).

Q. Where did he live?

A. At Araya, I think.

Q. Did you go to Araya before or after you went to Byers?

A. I went to Araya before I went to Byers.

Q. How far is Byers from Araya?

A. I suppose probably about fifty to sixty miles.

Q. You bought from Sanford on the 25th?

A. That is merely the date of the settlement with him. The settlement was made, if I mistake not, in Denver. You see that it is dated on the 27th.

Q. But that is the date at Colorado Springs.

A. That is the date of the check. I had a little pocket check book with me on the El Paso County bank, in Colorado Springs. I gave that check at Denver in settlement of that bill.

Q. On the 27th? The bill is dated the 25th.

A. Yes, sir.

Q. It certainly is not the date of the settlement. What date was it? If it was the date of the purchase and not of the settle-
65 ment why did you put a fancy date in there?

A. I didn't put any fancy date in there. I bought that wool from Sanford on or about the 22d of June, while I was in the Hugo country. I went out from Hugo to Mirage and to Araya in a buckboard wagon and bought these lots of wool out in that country and made arrangements with parties out there to do the shipping for me. Then I came on and went westward to Denver.

Q. Hugo was your headquarters for this circuit?

A. Yes, sir—no; both Mirage and Araya were merely water stations; they were not towns—that is, they were characteristic towns of Colorado, some of them. As soon as I could get away from either of them I got away. To get away from Araya I had to go into Denver on a buckboard wagon.

Q. You went from there to Hugo?

A. I went from Mirage back into Hugo. No; I have made a

mistake. I took the train at Mirage at about midnight for Byers. I got into Byers the next day, and I saw Mr. Sherman and Mr. McDownell and bought wools from them. The date of that bill of Sanford's doesn't fix the date of the purchase, as I say, be-
66 cause I left the shipping of the wool to a grower who lived out in Mr. Sanford's neighborhood, and he brought these papers in to me at the Windsor hotel, Denver, the original duplicate bill of lading, and I made that bill out for Sanford at the hotel.

Q. Is that your handwriting?

A. That is my handwriting; so that, as I say, the date of that bill don't make the date of the purchase.

Q. You make the date of the bill, and you do it while the matter is fresh in your mind, on the 27th of June, for the purpose of paying it. Why did you not put in the date of the purchase?

A. I didn't think it was necessary.

Q. Why did you fix it the 25th?

A. To the best of my recollection now, the party who shipped that particular lot of wool for me brought the bills of lading in to me at the hotel on the 25th, and from the weights, as you will find on this bill of lading—it is dated sixth month, 25th—I made this bill to agree with the shipping date of the wool. The bills of lading are dated the 25th of June.

67 Q. That is your explanation of it, as you say—you bought it when?

A. On or about the 22d of June.

Q. This place was near Hugo?

A. Within about fifteen miles of Hugo.

Q. The next purchase I find here is Mirage, June 29th. How many pounds were there in that?

A. That is the purchase from Wills Brothers, and was made at the same time that I bought the clip from Clifford, and, to the best of my present recollection, was on or about *about* the 22d of June, at Mirage.

Q. How much?

A. The bill is for 7,838 pounds gross.

Q. Did you take it?

A. Yes, sir.

Q. How much did you pay for it?

A. I paid $1,562.50.

Q. On what day?

A. July 1st. I gave a check to David Wills myself. He came in the hotel to see me.

Q. When was the Clifford purchase?

A. On or about the 22d of June.

Q. Where?

A. At Mirage.

68 Q. How much?

A. Twelve thousand and ninety-four pounds net. I paid for it $2,432.20, at 20 cents a pound. That Clifford clip we also took.

Q. (Referring to other papers.) What is that wool?

A. The Ronald Sherman clip, 60,000 pounds.
Q. Where did he live?
A. At Byers.
Q. When did you buy that?
A. I think it was the 24th of June.
Q. Where did you buy it?
A. I bought it in Byers, at his ranch.
Q. Near Byers?
A. Near Byers; about ten miles from Byers.
Q. How much was there of it?
A. According to my bill there was 60,007 pounds, net.
Q. When did you make the settlement?
A. The date of the draft shows July 6th.
Q. Did you pay Mr. Sherman anything on account?
A. No, sir; I wrote that bill and made out that bill to Sherman on the day I gave him the settlement, which was the 6th of July.

Recess to 2 p. m.

69 2 P. M.

Q. When did you buy the Holt Live Stock Company's wool?
A. The contract will show. I think it was on or about the first day of July.
Q. You received the telegram that has been read in evidence on the 16th of June, about 8 o'clock, from the hotel clerk?
A. Yes, sir.
Q. It was prepaid, was it?
A. No, sir—that is, it was prepaid up to Ellis. I paid 50 cents for the transmission of it from Ellis to Waukeeney.
Q. (Referring to telegram.) This is the telegram you sent that night, is it?
A. On the 17th.
Q. Did you send it on the 17th?
A. The 17th or 18th—whatever that means (indicating).
Q. It reads: "6, 17—half rate." That is a night message, isn't it?
A. Yes, sir.

70 Q. It reads: "Memory to-night Hugo disappointed in not hearing from you to-day." Dated Montara, Kansas, 6, 17. To Frank J. Primrose; signed, William B. Toland. What does that mean?
A. "Leave to-night for Hugo." That is what it means.
Q. "Will leave here to-night for Hugo"?
A. That is what it literally means; yes, sir.
Q. Did you send any other dispatch to him before you got the one of June 27th, 1887, from Mr. Primrose?
A. I can't say whether I did or not—that is, whether I sent him any messages or not.
Q. Where did you receive this dispatch, a copy of which was shown you, of June 20th?
A. I received that at Hugo, Colorado.

Q. On what day?

A. Either the 20th or 21st.

Q. It is dated June 20th, 1887, and this is the translation: "Telegram received. Wired you Friday. Can get no encouragement at prices you name, but perhaps you had better buy a few of the choicest clips, especially in Colorado, where we have a reputation to sustain as buyers. Mince;" which word means, as here explained, "wire when you do anything." This telegram was signed Frank J. Primrose, was it?

A. Yes, sir.

71 Q. June 21st there was a message sent by you upon the receipt of the one just read to Mr. Primrose?

A. Yes, sir.

Q. What is the date of that?

A. It is dated 6th month, 20th.

Q. Read it, if you please.

A. It reads: "Your telegram 20th received." The telegram, by the way, was rec'd after I had bought this wool. "Have bought Orcutt, Hamp, and Laurie 60,000 lbs., 20 cents; all extra choice. Strongly advise these and Yoxall's and Holmes' clips be not sold till shipped about July 15. However, will send samples at once."

Q. That is signed by whom?

A. William B. Toland.

Q. Directed to whom?

A. Frank J. Primrose.

Q. What explanation have you to make as to that?

A. I had travelled from 15 to 20 miles outside of Hugo, the telegraphing point, to buy these goods. I found this telegram from Primrose that he has just mentioned upon my return, after having bought this wool.

Q. And you so telegraphed him?

72 A. Yes, sir; I acknowledged the receipt of his telegram at the beginning of my message.

By Mr. JUNKIN:

Q. Is that the 20th or 21st?

A. The 20th; from Hugo; a night message; he got it on the 21st at Philadelphia.

By Mr. PETTIT:

Q. You sent it from there on the 20th?

A. Yes, sir.

Q. I think you have already said that the 19th was Sunday, the day that you bought one of these lots?

A. Yes, sir.

Q. So that this was Monday?

A. That was Monday—Monday afternoon.

Q. Where is the telegram from Mr. Primrose to Mr. Toland dated 21st, the receipt of which is acknowledged in the next dispatch?

Mr. JUNKIN: We have a copy of it here (referring to letter book). It reads as follows: "Your telegram of 20th received. Will hold wool as you suggest. Where shall I write you? Frank J. Primrose."

By Mr. PETTIT:

Q. Did you get that dispatch?

73 A. I think I did; yes, sir.

Q. Then you sent the one of the 22nd, the night message dated the 21st, is it not, from you to Mr. Primrose?

A. Yes, sir.

Q. Read it, if you please.

A. It reads: "Your telegram of 21st rec'd. Have bought Fields Ladues 30,000 lbs., 20 cents, and perfect daisies. Will leave here for Araya to-night; Thursday, Byers. Write me care Windsor, Denver. Have cleaned out all choice wools here."

(Telegram dated June 23rd called for by counsel for defendant, Toland to Primrose, and produced.)

Q. Look at that telegram and state where it came from.

A. Araya, Colorado, sixth month, 22nd.

Q. Was it a night message?

A. Yes, sir.

Q. By you to Mr. Primrose?

A. Yes, sir; it reads: "Have bought about 50,000 lbs., 20 cts.; 10,000 lbs., 19½ cts. Condition is good, condition is choice. Will ship some early coming week; have drawn at sight * * * El Paso Co. bank 500 dolls. for additional advances. Will leave here for Byers to-night."

74 Q. What is the date of the telegram I now show you?

A. Sixth month. It must be the 24th, I think. I cannot make it out distinctly—either 22nd or 24th.

Q. We will assume that it is the 24th. Now after you sent that night message of the 22nd, I find upon the same date June 25th. Please state which of those you got first and which second, and read it to the jury, giving the date and the name of the sender.

A. I cannot say now which I got first. There are two here, both of the same date, June 25th. The only c-ue that I have here as to the order of the messages are the dates in the copy book. I cannot tell you other than that which I received first. They may have both come into the hotel at the same time.

By the COURT:

Q. Have you read those before?

A. I think I have; both of them. I am pretty positive about the first. The other reads: "Dial. Your telegram 25th received. Hold off entirely until instructed." These are both dated June 25th.

Q. What does the other one say?

A. "Your telegram 24th received. Wired you last night stop buying until further orders."

75 By Mr. PETTIT:

Q. The telegram of the 24th therein referred to is the one I now hand you, is it not?

A. Yes, sir; that is what it is.

Q. Read that if you please.

A. It reads as follows: "Have bought McDownell 10,000 lbs., 20 cents; Sherman 50,000 lbs., 20½ cents; ship next week; don't judge on value Sherman clip by sample sent; ruined by dust storm; will send samples when shipping; no letters from you for weeks." These telegrams to Mr. Primrose were night messages.

Q. Where is the telegram of the 25th sent you by Mr. Primrose?

Mr. JUNKIN: We did not offer any after this order stopped. I stopped at the 25th. They are at your service, for we have nothing to keep back.

(Mr. Junkin here produces telegram of 25th June.)

Mr. PETTIT (to the witness). From whom to whom is that telegram?

A. That is from myself to Mr. Primrose. It is dated the 25th of June, from Denver.

Q. Please read it.

76 A. It reads as follows: "Your telegram of 24th received this morning. Annoying, though believe you can fix things right. If can buy of Holt 21 cents or less would advise doing it for Webb. The wool is choice. In our opinion, wool will not shrink over 50 per cent. or less. Answer by wire immediately and state if I had better make all present shipments to Boston."

Q. (Another telegram shown witness.) Read that telegram and state the date, who it is from, and to whom.

A. This is from Primrose to myself. It is dated here, June 24th. It reads: "Your telegram of the 23rd received. Stop buying until further orders—until I can see my way clear. Nonantum Worsted Company allows a $20,000 draft to come back, covering Carter's wool. Money very tight. Hurry forward shipments. Wools bought; but split drafts up into small amount as possible and as far apart as you can. Wrote you Winsor yesterday; will advise you when the clouds will roll by." I got that at the Winsor hotel, in Denver.

77 By Mr. JUNKIN:

Q. After you had got back from the wool district?

A. Yes, sir; after I had got entirely through, with the exception of Holt.

By Mr. PETTIT:

Q. You say you went out in June, 1887, with instructions to buy 50,000 pounds?

A. Yes, sir.

Q. And that you had bought that by about the 12th?

A. I think it was about the 12th; yes, sir.

Q. Did you buy anything between the 12th and 18th?
A. No, sir.
Q. Where were you at that time?
A. In the interval between the 12th and 18th I was travelling up northward in Kansas. I bought this 50,000 pounds of wool at Augusta, Kansas. That is in the southern part of the State. I was then making my way towards Waukeeney, which is in the northwestern part of the State. I bought nothing in the interval.
Q. Had you any particular object in going up in that direction connected with the wool business?
A. Yes, sir.
Q. What was it?
A. It was to travel through the country and find out all
78 that I could in that line of the business and to await orders for further operations before doing anything.
Q. You received this telegram, you say, on the evening of the 16th. Did you make any purchases in consequence of that telegram?
A. I did.
Q. How much had you bought on or before June 20th?
A. I cannot tell you without looking over the contracts.

By the COURT:

Q. Do not your papers show that you have before you?
A. Yes, sir; they will show contracts made on the 18th and subsequently.

By Mr. PETTIT:

Q. You bought what the contracts show that are already in evidence?
A. Yes, sir.
Q. And you bought nothing else?
A. I bought one particular lot for which I made no contract.

By the COURT:

Q. Have you not stated that?
A. Yes, sir.
79 Q. And you have given the date?
A. Yes, sir.

By Mr. PETTIT:

Q. Then you bought nothing else but what you have already testified to, did you?
A. No, sir.
Q. That was up until the 20th?
A. No, sir.
Q. The lot which you bought which you did not make any contract about was bought when?
A. It was bought on the morning of the 20th?
Q. Where?
A. About fifteen miles from Hugo.

Q. What was it?
A. About 20,000 pounds.
Q. Why did you not stop buying when you received this dispatch of June 20th at Hugo, telling you he could get no encouragement?
A. Because there were no orders in the telegram to stop buying.
Q. Is that your reason?
A. That is the reason; yes, sir. That is the only reason I could give then and the only reason I can give now.

80 By the COURT:

Q. You had previously gotten the telegram to buy?
A. Yes, sir; that is the idea. I had got imperative orders from him on the 16th.
Q. And in consequence of that you did not stop when you got this discouraging telegram just referred to?
A. No, sir; I did not.

By Mr. PETTIT:

Q. Look at the telegram I now show you and again state to the jury distinctly whether you have stated the only reason why you did not stop.
A. I saw no order in this telegram to stop buying.

By the COURT: That is not the question. The question is whether you have stated correctly in answer to a former question your only reason why you did not stop buying. You said your reason was because you were not ordered to stop.

By Mr. PETTIT:

Q. Finally you got a telegram dated the 24th directing you to stop buying until further orders. Did you stop then?
A. I stopped then; yes, sir.

81 Q. These other orders, then, that you bought later you bought on the strength of other instructions, did you?
A. Later than what do you mean?
Q. Later than the 24th of June.
A. The only clip I bought later than that was Col. Holt's.

By the COURT:

Q. And that you bought after telegraphic correspondence?
A. Yes, sir; with Mr. Primrose.

By Mr. PETTIT:

Q. When you got the original telegram on the evening of the 16th what did "destroy" mean?
A. "Destroy" meant by our code, "Your telegram of the 17th received."
Q. That was the 16th, wasn't it?
A. It was received by me on the 16th, this telegram was.
Q. That was plainly an error, wasn't it?
A. It was plainly an error; yes, sir.

Q. Did that attract your attention at all?

A. Not specially; no.

Q. You did not think to telegraph to find out whether
82 that was correct?

A. I didn't think that part of the message was worth bothering about. It was just as I supposed, probably a mistake by Primrose in writing the message out from the code book—that he had got the wrong key word.

Q. That you supposed?

A. Yes, sir.

Q. Then the difference—this order to you to buy—didn't that attract your attention in any way?

A. It attracted my attention to this extent, that I supposed that probably the market back East had shown some remarkable improvement and things had brightened up there and we wanted to get in while we had the chance.

Q. So that you supposed when he said "buy" that that meant "buy," did you?

A. Yes, sir; naturally I supposed that.

Q. While the word "bay" would have meant that he had bought, which would have meant the direct contrary?

A. Yes, sir; there was nothing to suggest my looking up that particular thing in the code book, because excepting the word "destroy" the most of the message is written in plain words. It reads: "Am exceedingly busy. Buy all kinds."

(Code book called for by Mr. Pettit produced.)

83 Q. Where did you get the word "bay" from?

A. I didn't look for the word "bay." The word "bay" don't appear in this telegram. There was nothing to suggest the word "bay" to me.

Q. I mean the word "bay" in your code.

A. From the source of most codes, out of Webster's Dictionary.

Q. Is this a peculiar word of your own?

A. That is one we made.

Q. Not the one furnished by the company?

A. No, sir; we made that up for our own individual use.

Q. So that you did not take notice of this error or you were not in any way uncertain as to the meaning of the thing that you got?

A. No, sir.

Q. And you immediately proceeded to buy?

A. I did, the first opportunity that I could get. A few days later I bought my first lot.

Q. Then you sent these telegrams stating that you had bought as soon as you made purchases or as soon thereafter as you could?

A. I sent some telegrams; yes, sir.

Q. You sent them from Hugo on the 20th and 21st, &c., announcing your purchases?

84 A. All the telegrams that I have seen I sent; yes, sir.

Q. And got no order to stop your buying until the 24th?

A. That seems to be the case; yes, sir. The telegram is dated the 24th. I got it on the morning of the 25th.

Q. This dispatch to you that he had no encouragement did not weaken your purchases at all?

A. It did not.

Q. Wasn't it a fact that you wished to keep up your reputation in Colorado as a buyer? Didn't that have something to do with your purchases?

A. That didn't have any influence on me at all.

Q. Although that was the instruction of your chief?

A. That was in the telegram; yes, sir.

Q. But that didn't bother you?

A. That didn't have any material influence on me; no; because by that time I had about bought all this wool—all but the Holt wool.

By Mr. PETTIT:

Q. No; that is dated the 20th.

Mr. JUNKIN: That didn't tell him to stop buying.

By Mr. PETTIT (to the witness): So that the goods that you bought on the 21st, 22nd, and 23rd were not influenced by this dispatch?

85 A. Not materially; no.

Redirect examination.

By Mr. JUNKIN:

Q. The first dispatch of the 18th of June says: "Disappointed in not hearing from you to-day." Does that "hearing" refer to telegrams or letters or both?

A. Well, telegrams. I didn't expect any letters at that point.

Q. When you got to Hugo you expected to have got a telegram and letter from him and got nothing there. That is dated the 18th, from Montara. You say you are going to leave to-night for Hugo; "Disappointed in not hearing from you to-day."

A. Well, I expected some further telegraphic advices from him at that point.

Q. You said the Holt purchase, made by you subsequent to this time, was made in consequence of a series of telegrams that passed between you and Mr. Primrose?

A. Yes, sir.

Q. Was that purchase entirely in consequence of later telegrams or earlier telegrams?

The COURT: He has said already that he made it after a
86 considerable correspondence by telegrams, which I believe you have before you, though I am not sure about that; but that it was in consequence of that that he made that purchase after conferring with his principal back and forward.

Mr. JUNKIN: But his further explanation was that he made that purchase because of the error in the original telegram of June 16th;

that combining that with the other telegram it made it a different meaning from what the other telegrams would have had.

Mr. PETTIT: The witness has already stated that it had nothing to do with that.

Mr. JUNKIN (to the witness): What was the reason of your making the Holt purchase?

A. I don't know that I can tell you at this late date just exactly what reason actuated me in that case.

By the COURT:

Q. You have said that you made it in pursuance of a long correspondence with Mr. Primrose?

A. I sent him several messages in reference to that particular clip, in order that I might get his judgment upon it before I purchased it—get something from him in the nature of an order.

87 By Mr. JUNKIN:

Q. Did he give you an order to buy the whole clip, specifically?

A. He finally left it entirely to my judgment.

Q. And you bought it?

A. I bought it.

(Mr. Pettit calls for telegrams in reference to the Holt clip.)

Dr. CHARLES N. SCHOLLENBERGER, having been duly sworn, was examined as follows:

By Mr. JUNKIN:

Q. You were engaged in the business of buying and selling wool in Philadelphia?

A. Yes, sir.

Q. Were you so engaged in 1887?

A. Yes, sir.

Q. Did you sell on account of the Keystone National bank for Frank J. Primrose certain wools in 1887?

A. Yes, sir.

Q. Have you an account of your sales here?

A. I have a copy of the account as furnished me by my bookkeeper.

88 Q. Have you any personal knowledge of those sales yourself?

A. I gave the sales my personal supervision; yes, sir.

Q. You have made a statement of them, have you not?

A. Such as we rendered to the bank; yes, sir.

Q. You say that you gave those sales your personal supervision?

A. Yes, sir.

Q. You know the prices realized?

A. Yes, sir; I know the prices they realized by those statements, and those statements were correct at the time. That is an exact copy of what we had in our co signment book.

Q. What does that statement show as the result of those sales? How much did you sell altogether?

A. The total receipts were $16,098.72. That was the receipt in cash for the sale of the wool. The charges are $6,199.59, leaving a balance of $9,899.13 remitted to the bank.

Q. That statement shows various lots of wool which you sold, with the number of pounds, dates received, etc.?

A. Yes, sir; it is all itemized.

Q. The prices realized for those wools were market prices, were they?

89 A. They were the very best we could get. Two or three weeks after we had closed this sale the bottom dropped out of the wool business. Two or three weeks subsequent to the sale of this wool the same kind of wool had dropped two and a half to three cents a pound, so that I think that will substantiate the fact that we had obtained a very good price for it. I did my very best to realize all that I could.

Q. You realized the market price?

A. Yes, sir; fully the market price.

Cross-examination.

By Mr. PETTIT:

Q. What is the cause of those excessive charges? What does the word "salvage" mean?

A. The vessel—I forget her name—foundered at sea and it was recovered on a lighter, and these were the charges—that is, the vessel which this wool was being shipped from Boston upon, consigned to us, foundered at sea, and these were the charges for rescuing her.

Q. Not the whole of it?

A. No, sir; not all of it. Salvage and freight and everything else; $5,080 out of the whole account.

90 Q. The item of salvage is how much? It don't cost $6,000 to sell $16,000 worth of wool ordinarily, does it?

A. The salvage is $5,080.22.

Q. That was because the ship foundered at sea?

A. Yes, sir; of course that includes freight and charges.

Q. There were other things besides that—$1,000 more?

A. No; I mean of that $5,080 there were some freights due the Winsor line.

—. (Referring to statement.) Does that mean New Mexican wool?

A. Yes, sir.

Q. Part of it is Colorado wool?

A. Yes, sir.

Q. That designates the place where the wool is clipped, does it?

A. It ought to; yes, sir.

By Mr. JUNKIN:

Q. The salvage that you have referred to, which Mr. Pettit has asked you about, was not salvage of the Colorado wool*m*, but New Mexican wool?

A. Yes, sir.

91 Q. The transaction which you have here upon this paper covers a lot from New Mexico and some from Colorado, and the salvage was entirely on the New Mexican wool?

A. Yes, sir; that was on the boat.

Mr. PETTIT: I object to all this. The only thing contained in this statement is an item of 18,000 of Colorado wool.

Mr. JUNKIN: I have offered already to substantiate this matter at another stage of the case. I do not offer the paper in evidence now.

92 FREDERICK L. SCOTT, having been duly sworn, was examined as follows:

By Mr. JUNKIN:

Q. What is your business?

A. Telegraph operator.

Q. Whereabouts are you employed now?

A. I am now employed by the Postal Telegraph and Cable Company at # 101 North Third street, Philadelphia.

Q. How long have you been in the telegraphic business?

A. Thirteen years.

Q. Where were you employed in June, 1887?

A. By the Western Union Telegraph Co., # 62 North Front street.

Q. How long had you been in their employ prior to that time?

A. I think I went there in 1883.

Q. You had been in that company's employ in the neighborhood of four years?

A. Since 1883.

Q. In the neighborhood of four years up to that time—1887?

A. Yes, sir.

Q. Did you know Mr. Frank J. Primrose?

93 A. Yes, sir; I knew him since 1884; I think — is the first time I met Mr. Primrose.

Q. How did you meet him? In a business way?

A. Yes, sir.

Q. Did you know what his business was or did you learn after that time?

A. I knew he was in the wool business—a wool dealer.

Q. Did you know Mr. Toland?

A. Yes, sir.

Q. Did you know what his business was?

A. I knew he was with Mr. Primrose. I did not know his position.

Q. Did you ever receive any telegram from Mr. Primrose to be sent to your office?

A. Numbers of them.

Q. What proportion did he bear as a customer of yours to other people?

A. In the wool season I considered him one of my best customers.

Q. Certainly he was among the best customers you had in the wool season?

A. In that season; yes, sir.

Q. Is that a bill signed by you? (Bill for the month of June handed witness.)

A. Yes, sir.

94 Q. That is Mr. Primrose's bill for the month of June, 1887?

A. Yes, sir.

Q. Receipted by you?

A. Yes, sir.

Q. Do you know when that was paid?

A. It was paid some time during July. I can't say exactly. In the early part of July.

Q. Upon June 16th, 1887, did Mr. Primrose give you that message to be sent or was it sent to your office?

(Message dated June 16th, 1887, handed witness.)

A. I sent it, but I can't tell how it came in the office; whether he brought it or whether it was brought by one of the boys.

Q. Is this included in that bill?

A. Yes, sir.

Q. You say you personally sent this telegram?

A. I sent it.

Q. You have been in the telegraphic business how long altogether now?

A. Thirteen years.

Q. Up to the present time?

A. Yes, sir.

Q. What difference is there in the telegraphic system of sending or receiving messages between the words "bay" and "buy"?

95 Messages are received by sound, are they not, and sent?

A. Yes, sir.

Q. You send them out by sound and receive them by sound?

A. Yes, sir.

The COURT: What are the sounds for the one and what for the other of these terms?

By Mr. JUNKIN:

Q. The two b's and the two y's are the same?

A. Yes, sir.

Q. What is the difference between "u" and "a"?

A. "A" is a dot and a dash and "u" is two dots and a dash.

Q. Illustrate that on the thing in front of you.

The witness did as requested.

Q. The pause is upon the last touch of the "u"?

A. Yes, sir.

Q. What is the difference between the word "destroy" and the word "despot"?

A. There is a vast difference.

Q. There is a vast difference?

A. I should think so.

Q. Can you take a pencil and write out the two words "despot" and "destroy" in telegraphic symbols?

A. Yes, sir.

96 Q. Please do so.

(The witness wrote in telegraphic symbols the words "destroy" and "despot.")

Q. What difference is there between "s" — purchase and purchases? What difference is there between those? What makes the sound "s"?

A. "S" is three dots (illustrating).

Q. So if "s" is omitted from a word there would be three dots short? If "purchases" was sent over the wires and the operator who received it only wrote down "purchase" he omitted three dots from the end of the word?

A. Yes, sir.

Q. Taking these two telegrams that have been in evidence—one you received and the one that Mr. Toland says he received at the other end—what could be the cause of such a difference in the two telegrams as sent and received?

(Objected to.)

The COURT: How can he know what is the cause?

Mr. JUNKIN: I thought as an expert he might be able to tell what would make such a difference.

The COURT: The difference is made by an incorrect send-

97 ing of the telegram. We know that as well as the expert. Whether there was carelessness in it is another thing. He cannot give an opinion about that.

Mr. JUNKIN: My thought was to have the witness say that there was no reason for such a thing as that unless the wires were out of order or unless there was carelessness it could not have happened.

The COURT: I do not see how he could say that. This message was transmitted on its way. It was not a continuous message from the point where it started and the point where it was received. There was a retransmission of the message, and, of course, the change between the message which it started here and was delivered at the office and the message that was received must result from the failure where the message was retransmitted, either by taking down incorrectly or sending it incorrectly from that point. He cannot say why that occurred.

Cross-examination.

By Mr. PETTIT:

Q. Rap for the jury "bay."

The witness did so.

Q. Please rap "buy."

98 The witness did so.

Q. The only difference is a dot, is it not?

A. One dot.

Q. Where did you send that message to?

A. I sent it to the Western Union general office here in Philadelphia.

Q. Do you know what the route of it would be?

A. No, sir.

Q. You do not know where it would go from Philadelphia?

A. Not after I sent it to the main office. I have no knowledge how it was sent after that.

The COURT: This witness, I think, might properly have been asked the question to rap out the sounds which would be made by the instrument in transmitting to the receiver the message. Of course to you and to me there is very little percepitable difference probably. He might have been asked whether or not, to an experienced telegraph operator, the difference between the sounds are very distinct or whether they are not.

FREDERICK L. SCOTT recalled.

By Mr. JUNKIN:

Q. His honor has suggested this question. In the two words rapped out there would there be any difference to an expe-
99 rienced telegraph operator in the sound between "bay" and "buy"?

By the COURT:

Q. You rapped out the telegraphic sounds in making the word "bay," did you not?

A. Yes, sir.

Q. You also rapped out those sounds that are made in telegraphing the word "buy"?

A. Yes, sir.

Q. To an experienced telegraph operator are those sounds distinct and different?

A. It depends on the sounding operator. All operators have peculiar ways of sounding. Some are light and some are heavy. I should imagine a man sounding very light on a light wire that he could very easily get the word "buy" if he was not careful.

Q. That is, the receiver might be misled?

A. Yes, sir.

Q. But if they were properly rapped out how then?

A. If they were properly rapped out and the operator was paying attention——

Q. Of course, as he should do——

A. I do not see how he could make a mistake.

Q. In other words, if both the operators did their duty at-
100 tentively?

A. If both did.

Q. Then you do not see how the sounds of the one could be mistaken for the other?

A. If it was sent to him properly I do not see how he could.

By Mr. PETTIT:

Q. Does not an interruption frequently happen from some disturbance along the line? How long do you usually telegraph; from what distance? How long are you between repeating points?

A. Sometimes one hundred miles and sometimes not as far.

Q. In one hundred miles if there is a cross or snap wire or repairing a wire or altering the battery?

A. It would be very likely that another dot could be put in if there was any interruption in the wire.

Q. All this will make interruptions?

A. Yes, sir.

Q. The letter "b" consists of a dash and three dots, does it not?

A. Yes, sir.

Q. "A" is a dot and a dash?

101 A. Yes, sir.

Q. And the "y" is two dots and then two dots?

A. Two dots a space and two dots.

Q. "B" would be three dots, "u" would be two dots and a dash, and "y" would be four dots—two dots and then two dots?

A. Yes, sir.

Q. So that in "bay" there are two dashes and eight dots and in "buy" two dashes and five dots, are there not?

A. Yes, sir.

Q. On one hundred miles of wire that might happen easily?

A. There are six dots in "buy" and two dashes.

By Mr. JUNKIN:

Q. Are not all letters a series of dots and dashes—it is all dots and dashes?

A. Yes, sir.

Q. The system of sounding telegraphic messages now is all dots and dashes?

A. Yes, sir.

Q. The experienced operator must know exactly how many dots and how many dashes make a letter?

A. Yes, sir.

102 By Mr. PETTIT:

Q. In your office did you use a tape or did you receive by sound?

A. To receive a message?

Q. Yes.

A. No, sir.

Q. Is it not a fact that owing to the differences in writing to the sending operator and to the liability of disturbance on the wire making only partial dots or dashes that you can get a message more accurately by ear than you can upon the tape?

A. I do not know anything about tape. I never saw one work. I never worked one.

Q. You never used the tape?

A. I never did; no, sir.

Q. Do you not know as a telegrapher that that is the reason you do not use tape, because your ear is more reliable?

A. Yes, sir.

By the COURT:

Q. The use of the ear is adopted as the approved system?

A. Yes, sir; it is the present system.

By Mr. JUNKIN:

Q. The ear becomes very expert, I suppose?

103 A. Yes, sir.

Q. But in doing your duty you have got to watch and be careful?

A. Yes, sir; you have got to be careful.

Q. If you are not careful, then, you make mistakes?

A. You are liable to make errors.

FRANK J. PRIMROSE, having been recalled, was examined as follows:

By Mr. JUNKIN:

Q. To go back where you broke off your story, the sending of this telegram and the receiving of telegrams from Mr. Toland, which have been offered in evidence here up to the 24th or 25th of June, when you sent him word to stop. Why did you not, prior to the 24th or 25th of June, order him to stop buying according to the telegrams sent you?

A. Mr. Toland was so closely connected with me and had so much authority that I felt that he might have had some cause of his own that I was not familiar with to do as he did. I could not think of any other reason. He had received no instructions from me and if he did do anything of the kind he did it on his own responsibility.

104 Q. You had no suspicion there was any error in the telegraph?

A. No, sir; not at all.

The COURT: He said before it was not until Mr. Toland came back that he found it out.

By Mr. JUNKIN:

Q. You sent him on the 24th a message to stop buying?

A. Yes, sir.

Q. On the 21st you received a telegram saying he had bought sixty thousand pounds, and on the 22d you received a telegram saying he had bought thirty thousand pounds. On the 23d you received a telegram saying he had bought fifty thousand pounds. On the 24th you stopped him.

A. Yes, sir.

Q. Why did you stop him eventually on the 24th?

A. I can think of no reason. It is impossible for me to state correctly just the condition of my mind about it. I could not understand any part of the transaction.

Q. It was all a mystery to you?

A. It was until his return and remained so until after he got home. I did not know a thing about it. It certainly was
105 time to stop him on the 24th. I cannot think of any other reason.

Q. Up to that time he had bought about three hundred thousand pounds of wool, and you, not knowing what on earth it meant, stopped him?

A. Yes, sir.

Q. When did you receive samples of this stuff?

A. Long after they had all been bought. I cannot tell you just what dates.

Q. Before he got back?

A. I do not know whether all of them came in before he got back; most of them.

Q. You received some samples after he came back?

A. Yes, sir.

Q. And notification from him as to what he had paid for them?

A. Yes, sir.

Q. What did you do with the samples you received?

A. I tried to sell them.

Q. What did you find out?

A. I found I could do nothing with them. I tried here thoroughly, I think. I went to Boston, to Hartford, to New York, and points near by and found nobody that I could do anything with them quickly. If I could have taken time to have treated
106 them and held them and coaxed them a little I might possibly have found somebody to take them. But I could not find anybody to take them *them*.

Q. Do you mean would not take them at any price?

A. No, sir; would not even make an offer on them.

Q. Why?

A. I do not know why unless it was that the money market just at that time was in a very tight condition. People were all complaining. I know at that time it caused us inconvenience in other channels, and that together with the general undesirability of the wools that season as compared with prior seasons.

Q. There was nothing wrong with these particular wools, but it was not a season——

(Objected to.)

Q. Was there anything wrong with these particular wools?

A. Not that I know of, any more than any of the rest of the growth of the State of Colorado.

Q. You endeavored to dispose of them and you could not find, as I understand you, a quick market?

A. Yes, sir.

Q. What was the market value of those wools here? As
107 I remember the price Mr. Toland has given them, they averaged nineteen and a half cents to twenty-one cents.

A. Do you mean at that time?

Q. He said he paid for them—the lowest nineteen and a half cents, and it runs up to twenty and twenty and a half, the highest being twenty-one cents—averaging about twenty cents—the prices paid. What was the market value of those wools when they arrived from the West?

A. At the time of their arrival?

Q. Here; yes.

A. The result of the wools showed that the highest was about fifteen cents, in round numbers—at least as the round price. Of course, that may vary some.

Q. What sales of those wools were made here or elsewhere in the Eastern States, at places where they were shipped?

A. I would have to have papers to pick them out. (Referring to papers:) Here are the sales that were made in Philadelphia: I think it was the Sanford and McDonald wool that was sold by Dr. Schellenberger; this is 18,224 pounds, if I remember correctly, of the Sanford & McDonald clips.

108 Q. Two of those clips that Mr. Toland has testified to?

A. Yes, sir; two of the clips Mr. Toland had bought.

Q. They were sold for how much?

A. Thirteen and a half gross—that is, less expenses, freight charges, and so on.

Q. How much per pound did they sell for?

A. Thirteen and a half cents per pound gross.

By Mr. JUNKIN:

Q. 18,224 pounds sold at thirteen and a half cents gross?

A. Yes, sir.

Q. What else was there sold?

A. Here are fifty-eight pounds sample lot of Colorado at twenty-two cents. That is evidently a portion of that same wool sent out as a sample to get somebody to take hold of it.

Q. Anything else there?

A. Nothing else bearing upon there.

Q. The only sale upon this list that Dr. Schellenberger made for you was 18,224 pounds Colorado?

A. Yes, sir; and this small sample.

Q. Do you know what expenses were chargeable against those 18,224 pounds?

109 A. The bill don't show it itemized. They could be picked out. Here is freight on two hundred and sixty-one sacks, a portion of it, $259.88, and on sacks $240.28. There is drayage, hoisting, and labor that would apply to the rest of the wools as well.

Q. The only items that you are sure of are $259.88 and $240.28?

A. Yes, sir.

110 Q. That would come off the total receipts?

A. Yes, sir.

Q. Where did the balance of the wools go that was sent to the East?

A. There were 21 clips went to Hutchins, Kitchen & Co., of Boston, and there were 3 clips that were not handled by me at all except by Mr. Toland in the West. I never saw them. I simply saw the drafts drawn on me. They were handled by Denney, Rice & Co.; held by the German Nat. bank, who Mr. Toland had made arrangements with.

Q. Take the Hutchins, Kitchen & Co. purchase. What did those sales realize here?

A. The papers show that. I cannot remember exactly. It was the Wells & Clifford clip, if I remember rightly. There were two clips. 12,094 pounds of the Clifford clip cost 20 cents. This does not give the result. This has not got Hutchins, Kitchen & Co. attached to it. They must be somewhere there.

By Mr. PETTIT:

Q. What papers are those you have there?

A. Those are the ones that have been already offered in evidence. This memorandum is made by me, showing the loss: Wells
111 Brothers' clip cost $1,562.40 and Clifford's cost $2,432.40; total, $3,994.80. It was shipped to Boston, and I sold it to Hutchins, Kitchens & Co., through a broker, and it netted me $3,328.70—that is, the freight has been deducted in that case, showing the loss on those two clips of $666.10.

Q. You made those sales yourself, did you?

A. Yes, sir.

Q. Were they made at the highest market prices?

A. Yes, sir; higher than any others that sold.

Q. You did the best you could to make them bring the best possible prices?

A. Yes, sir; the Sherman purchase cost $12,350.63; the Holmes purchase, $2,717.15; the —— purchase, $2,631.51; total, $17,699.63; amount received by the German National bank, by Denney, Rice & Co., who sold these goods, as these papers show—the total net proceeds received by them, $10,722.18, showing a loss on those shipments of $6,977.45. That is all of Mr. Toland's purchases.

By the COURT:

Q. There were some purchases that Mr. Toland made that fell through; you did not get the goods?

A. Yes, sir.

112 Q. What was done in those cases by you?

A. Thus far we have simply lost the advances on them.

Q. You made no arrangements with the sellers?

A. Haven't done so as yet.

Q. What have the sellers done?

A. In two instances, one has commenced suit against us.

Q. Is that pending?

Mr. JUNKIN: It is still pending.

The WITNESS: One of them I saw in December in Denver, Mr. Field, and he told me——

(Objected to.)

By the COURT:

Q. Have they presented claims to you?

A. No, sir; for no amount. They simply told me that they were waiting the result of this suit, and then they would expect me to make good to them their claims, whatever they might be.

Q. Can you say whether or not they have released you from your bargain?

A. They have not released me.

Q. Any of them?

A. No, sir; none of them.

113 Q. Were there more than three which you did not take?

A. Yes, sir; we didn't take the bulk of them; seven of them were not taken.

Q. In those cases you lost your advances, and that is all the money you are out of pocket?

A. So far.

Q. No arrangement has been made with any of them?

A. No, sir; none whatever.

Q. Have they all informed you that they held you responsible?

A. Not all of them, except through others. I can say yes to that. Mr. Field told me that they were all expecting the accounts to be made good after this suit had been decided. If not favorable then they would look to me.

By Mr. JUNKIN:

Q. Mr. Field lives right in a central place?

A. He lives in Utah, Colorado.

Q. So that those claims are still all open?

A. Yes, sir.

Q. In addition to what you have told the jury as to the losses resulting directly from these purchases that Mr. Toland made and the claims still held against you by these parties, did you suffer any other losses?

114 A. Yes, sir.

Q. What were they?

A. I was at that time operating in Texas and in New Mexico; in fact, these five hundred thousand pounds that I referred to in my telegram that I sent to Mr. Toland were made up partially of Texas wools and New Mexico wools and South Colorado wools, away from where Mr. Toland was operating; I said——

(Objected to.)

Mr. JUNKIN: I propose to show by Mr. Primrose that he had purchased in New Mexico and in the South, in different places South, growing States, a large lot of wool at a certain price, and that when these drafts came upon him which Mr. Toland had drawn upon

him on account of the wool he purchased, absorbing all his money, he had to meet them when they came to Philadelphia; he was unable to take care of his other purchases, and the whole thing went by the board and he lost something in the neighborhood of fifty thousand dollars.

The COURT: Is that a direct proximate result? It is well settled in these cases, and it is only an application of the rule of
115 law that has been well understood and applied to a similar class of cases time out of mime, that it is only the direct injury, the damages that flow directly from the mistake, that can be recovered—such damages as the defendant may be supposed to have contemplated as a result of a failure in wool. The company could know nothing of *of* the defendant's situation, his embarrassment in his business, and the effect of such a mistake upon his business, and could not foresee that his failure of duty would subject him to *to* any other loss than the loss that might result on the purchases which he was misled to make, and those losses, of course, will be just the difference between what he paid and what he sold for and the expense of bringing them to the market, and so forth.

It seems to me, and I suggest it to you, that what you propose to show is not a direct result that could have been foreseen, that might have occurred to anybody who had been subjected to such a mistake, but it is the consequence of this gentleman's peculiar and particular situation, and rather of his efforts to extricate himself, which might have been unwise or wise from the situation in which they placed him. It strikes me that it is doubtful whether you
116 can recover anything more than what you can satisfy the jury you have lost on the purchases of these goods.

Mr. JUNKIN: I also had intended to make a further proposition, which I suppose is covered by your honor's ruling, that the result of this thing was that Mr. Primrose was thrown into bankruptcy.

The COURT: That would be too far off.

Adjourned until Wednesday, April 10th, 1889, at 10 o'clock a. m.

117 U. S. C. C.

PRIMROSE
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Butler, J.

WEDNESDAY, *April 10th*, 1889.

Present: Messrs. Junkin and Junkin, for plaintiff; Silas W. Pettit, Esq., for defendant.

FRANK J. PRIMROSE recalled and further cross-examined as follows:

By Mr. PETTIT:

There appears to have been a telegrem, dated June 17th, from Primrose to Toland, commencing, "Wired you Friday, 17th." I call for it.

Counsel for plaintiff state that they cannot find such telegram.

Mr. PETTIT (to the witness): Have you a telegram dated 19th of June, Toland to Primrose, announcing the purchase of the Yoxalls and Holmes clips?

A. Yes, sir (producing same).

Q. Please read it.

A. It reads as follows: "Hugo, Colorado, 6, 19th." It was received by me on the 20th. It was a night message. "Frank
118 J. Primrose: Neither letters nor telegrams from you here. Keep me regularly posted or impossible to buy. Have bought Yoxall clip, 30,000, 22 cents per pound; Holmes, 14,000 pounds, 20¼ cents a pound. Grade and condition beyond comparison. Will send samples at once. (Signed) William B. Toland."

Q. There appears to be also a telegram from you to Toland, dated June 23rd. Please produce it.

A. I have no copy of it.

Q. How do Arizona and New Mexican wools compare with Colorado wools in price?

A. It depends altogether on their condition. They are used for different purposes usually. You can't tell anything about that. It is an entirely different character of wool.

Q. These wools that you purchased in Colorado and Kansas, how were they bought? Were they graded?

A. No, sir; they were not. They were bought in clip lots.

Q. Where are they graded?

A. They are graded, if at all, when they come East.

Q. Are they not necessarily graded before they are used?
119 A. Not before they are sold. They are either graded by the dealer or by the manufacturer who buys them.

Q. That grading is done East?

A. Always, or at least usually.

Q. I notice in some of these prices you make a difference for black and for bucks. What is the meaning of that?

A. Simply because bucks shrink more in scouring than the regular wool, and the black is usually not so ready of sale.

Q. So that when you buy a big lot—a clip of this sort—you have got to take the blacks and bucks along with the rest?

A. Exactly; yes, sir.

Q. You have to strike an average. Now, is there any average?

A. What do you mean by that?

Q. I mean to say in the purchase of clips in the rough in that way is there any average on which they grade when they come to be sold?

A. Well, yes, sir; as a rule, black sheep are largely in the minority. There is about one in 500. They keep them for markers oftentimes. They look at the black sheep and determine how may sheep they have in their entire yard.

120 Q. How about the bucks—is there any proportion for them?

A. Oh, no; the proportion is very light.

Q. I say is there a regular porportion for them?

A. Well, yes, sir.

Q. What are the grades of wool when you come to market them?

A. Do you mean Colorado wools?

Q. Yes, sir; or Kansas wools.

A. Colorado wools grade principally medium, fine medium, and fine. There is very little below a medium.

Q. How did these wools grade?

A. Principally fine medium. The average would be fine medium.

Q. How did these wools grade that you got in this lot from Yoxall and these other people that Mr. Toland bought for you?

A. Fine medium and fine, I should say.

Q. Do you know?

A. I never saw any one of the actual lots. I only judged by the samples I saw.

Q. In one of these cases you were warned not to judge by sample. As a matter of fact, you can't tell accurately by sample, can you?

121 A. We buy wools that way oftentimes.

Q. And oftentimes you do not?

A. The bulk of the purchases are made by samples. We have no other way to do it.

Q. Isn't it quite usual to make purchases by inspection?

A. It is quite usual, but not in buying of the grower; that is either done by sample or through a representative, as Mr. Toland was in my case, in buying from the growers or any of the producers.

Q. In the lot that you sold through Schollenberger, or, more correctly speaking, as I understand you, which the Keystone National bank had sold for your account, what did you get for the Colorado wool?

A. According to this statement, 13½ cents, less freight.

Q. Do you mean that the freight had yet to come off?

A. Yes, sir; it was to come off that gross amount.

Q. So that this was the gross price?

A. Yes, sir.

Q. The gross price here of Colorado was 13½ cents. Was that a good grade wool?

122 A. I should say that it was about the same in grade as all the others—fine and fine medium. I knew no difference. In fact, I saw a large portion of that wool in bags myself.

Q. I notice that wool from the same section at almost the same dates sold in Boston at 18 cents.

A. What grade was that—fine medium or fine?

Q. It was fine and medium.

A. Let me see that bill, if you please.

Q. I hand you the bill. Explain the difference, and state whether that Philadelphia wool was of as good grade as the Boston wool.

A. Some of it here sold for 20 cents—129 pounds medium. Medium is the most valuable if the shrinkage is right.

Q. How do you explain the difference between the price of that wool and the other—that is, the price at which that and the other sold?

A. The only difference that there could be would have been in the shrinkage, if 13½ cents was all that could have been obtained for it here. You will understand that I did not sell this wool, but that could have been the only difference in the shrinkage. The wool that was sold in Philadelphia might possibly have shrunk 15 or 20 per cent. more than the wool in Boston.

123 Q. And that is your explanation?

A. That is the only explanation I can give you.

By the COURT:

Q. Would that account for it?

A. Yes, sir.

Q. Is that usual and common or otherwise?

A. Yes, sir; very common between different lots.

Q. What do you mean by "shrinkage"?

A. We buy wool in the grease and pay for 100 pounds of wool and dirt; then it is scoured and we get anywhere from 20 to 50 pounds of wool; the rest is dirt.

Q. I understand that, but this is the price per pound.

A. In the grease, not for the wool.

Q. Then the difference in the price you account for by the difference in the condition of the wool?

A. Yes, sir.

Q. It is not the shrinkage, but the shrinkage it is liable to upon being washed?

A. Yes, sir.

Mr. JUNKIN: They call dirt and grease shrinkage.

The COURT: It means the shrinkage it is liable to.

The WITNESS: Yes, sir; the condition of the wool to be governed by the shrinkage.

By Mr. PETTIT:

Q. If I understand you in this, the Keystone-bank lot that you speak of had not been shrunk—it had not been washed when it was sold?

A. No, sir.

124 Q. You say that it was on account of shrinkage, and yet I understand the wool was sold before it was shrunk.

A. All wools are unless it is specially stipulated.

Q. I do not understand you and I do not know that the jury do. Explain to me how you deducted for shrinkage before the shrinkage took place.

A. That is a matter of judgment between the buyer and seller always.

By the COURT:

Q. The purchaser looks at it and judges what shrinkage it is liable to?

A. Exactly.

Q. And he pays accordingly?

A. Yes, sir.

Q. That is, he judges how much dirt there is in it and calculates for that?

A. Yes, sir. Mr. Toland could tell you, I think, the exact shrinkage on that particular lot of wool. I think so, because he bought it.

By Mr. PETTIT:

Q. Is Mr. Toland a good sorter?

A. He has been in the business eighteen years.

Q. What is it you call the gentleman who separates the
125 wool?

A. A grader.

Q. Is he a competent grader?

A. I can't say that, except to say that any man occupying the position that he does ought to be able to grade, sort, or do anything connected with the business.

Q. Are you able to do it?

A. I think so. I claim to be.

Q. Do you say medium is the best?

A. Well, it is apt to be lighter shrinkage, and therefore more valuable in the grease—not in the scoured pound.

Q. Medium is more liable to be valuable in the fleece?

A. Apt to be. Not always, but apt to be.

Q. What is the next?

A. Next in shrinkage would be fine medium.

Q. The next most valuable, as a rule, on an average in the fleece would be fine medium?

A. Yes, sir.

Q. The next most valuable, I suppose, would be fine?

A. Yes, sir.

Q. But in the shrunk wool or washed wool the reverse would be the case?

126 A. Yes, sir.

Q. Fine would be better than fine medium, and fine medium better than medium?

A. Yes, sir; that is more valuable. Of course, there are other things to consider.

Q. These wools purchased by Mr. Toland—how did they grade when they came to be sold?

A. Those that I sold I sold in the original clip lots, just as they were received. Consequently I know no more about the grade than I have already stated.

Q. When this dispatch speaks of some of them as "perfect daisies," did they turn out to be so in the eye of the purchaser?

A. I saw nothing of them but the samples.

By the COURT:

Q. Were the samples up to the representations?
A. Yes, sir; I should say they were.

By Mr. PETTIT:

Q. Did you get a better price than usual for them?
A. Perfect daisies—I don't know that we got any of those. They may have staid in Colorado. Denny, Rice & Company may have sold some of them. I can't tell you about that from memory.
127 Q. You sold a lot of the Yoxall clip. What was the condition of the Yoxall clip?
A. I didn't see the Yoxall clip. Denny, Rice & Company sold that Yoxall clip.
Q. How about the Holmes clip?
A. I didn't see that.
Q. Where was that sold?
A. By Denny, Rice & Company, of Boston. I sold no so-called "perfect daisies."
Q. From your knowledge of the transaction state whether or not these wools graded well when they were brought here for sale.
A. I should say so. Do you mean Denny, Rice & Company's?
Q. No; I mean all of them—the lot in dispute here now.
A. Yes, sir.
Q. You think they did?
A. Yes, sir.
Q. They were delivered to you in early July, weren't they?
A. Yes, sir; some time in July, I should say.
Q. You know about your contracts, do you not?
A. Do you mean here in the East?
128 Q. No; I mean when they were delivered to you f. o. b. at the station there.
A. We got them in July principally.
Q. When did you sell them?
A. Two of the lots were sold about July 25th to Hutchins, Kitching & Company, of Boston. Dr. Schollenberger's handling was sold September 23rd. The Wills Brothers and the Clifford clip were sold about July 25th in Boston by me.
Q. At what prices?
A. I can't give you the price, for the reason that my bill book isn't here. I sent to Chicago for it and it didn't come. I have the total net result and can divide it up.
Q. State in rough about what it was.
A. I can't state that unless I figure it up. It appears to be about 16¾ cents.
Q. Where was that sold?
A. In Boston, by me.
Q. Did you or not get the best market prices you could for these wools?
A. I should say yes when I sold them.

129 Q. At the time they were purchased what was the price in the East for those wools?

A. Take them all through, I said yesterday about 15 cents I thought the general value of them was.

Q. No, no; I mean at the time when they were bought by Mr. Toland.

A. I should not say they were worth at that time more than a cent to three cents more, varying according to the lots—according to the condition of the different lots—that is, from a cent to three cents more than 15 cents at that time. In other words, from 16 to 18 cents at that time.

By Mr. JUNKIN:

Q. Where is that, in Philadelphia?

A. In Philadelphia, Boston, or New York.

By Mr. PETTIT:

Q. The freights to Boston are slightly more than to Philadelphia, are they not?

A. About twelve cents a hundred, usually, more than to Philadelphia. The average freight would be about $2.40 to Philadelphia.

Q. How much more to Boston?

A. Twelve cents a hundred. That was last year; at least
130 in 1887. About $2.40 would be the average per hundred.

Q. It would make no difference whether it went by sea by the Norfolk route or the northern route?

A. No, sir; not at all. The arrangement was made there.

Q. You were notified on Monday morning, the 20th of June, that Mr. Toland had nearly doubled up his order; he had bought 50,000 pounds a week at least before, and then he had bought 44,000 pounds, part at 22 cents and part at 20¼ cents. To your knowledge at that time had he any authority from you to make that purchase?

A. No, sir.

Q. Did you want the wool?

A. I answered that yesterday. Just as I told you then I tell you now. I didn't know what he might have had in mind or what he knew, and I didn't understand it until his return to Philadelphia.

Q. I understand that you relied on him and he relied on his telegram without making any further inquiry?

A. I certainly relied on him as I did in many other instances, and, in fact, almost any instance.

Q. That is your answer to that question, is it?

A. Yes, sir.

131 Q. Later on, the next day or so, when you told him to keep up your reputation as buyers in Southern Colorado, what did you mean?

A. I don't remember now what my thought was at the time. I can't recall it. We had been operating for years in Colorado. If we did any buying at all that was the place to do it. Some of the

clips were small. But I can't tell you now just what my thought was.

Q. You did telegraph him to that effect, did you not?

A. Yes; there is the evidence of it.

Q. And he telegraphed you that he had cleaned out all the wools in that section? Why did you not stop him then?

A. I did finally.

Q. But he didn't stop after that, and bought 85,000 pounds more?

A. Yes; then I guess I stopped him.

Q. But after you stopped him you let him loose again?

A. No; I didn't.

Mr. PETTIT: He so testified.

The COURT: No; he said that he had a long correspondence.

The WITNESS: He never had any authority from me to buy
132 that wool. It was left to his judgement entirely. My position about that matter was this: He had bought I don't know how much—three or more hundred thousand pounds at that time that I couldn't take care of—at least I wasn't then sure that I couldn't take care of it, because I was making every effort that I could think of to take care of it all.

Q. And being in the wool business you didn't think it made any difference whether it was a sheep or a lamb?

A. He finally telegraphed me about this Holt clip. You will find that he telegraphed me several times, and I made absolutely no reply whatever to it until four or five days after the receipt of the first telegram. Then my condition of mind was such that I felt that 385,000 could be taken care of just as well as 300,000, and said, "You know my position. Use your own judgment," or some such words to that effect. I made no reply until he had repeatedly telegraphed and written about it.

Q. And, as I say, then it got so far that it made no difference whether it was a sheep or a lamb?

A. Well, no, he was there to take the wool—to protect the wool.

133 Q. When was it that the worsted company draft that you speak of, of June 24th, came back on you—or of June 23rd?

A. I don't remember.

Q. Please refer to your letters, at page 135, and state about it if you can.

A. I remember the draft well, but I don't remember the date exactly. It never came back. They threatened to send it back.

Q. That is not what you said. You said the company allowed a twenty-thousand-dollar draft to come back.

A. I know that. They so notified me, but it never came back.

Q. When did they notify you?

A. It was either June 23rd or June 24th. I have here a telegram to them.

Q. It was not until then that you stopped his buying, was it?

A. Whatever the date of that telegram was.

Q. Although you knew that prior to this time and while these

purchases were going on he was buying and the prices that
134 he was paying, nevertheless you did not stop him, but took the chances of his judgment—is that what we are to understand?

A. Well, not necessarily that, as I told you before. I didn't know what he might have had in view or what possible outlet he might have had for the stuff. He had the privilege of selling as well as buying.

Q. On the contrary, he tells you where he wants to sell them to a gentleman by the name of Talent?

A. Talent is Webb.

Q. Which lot do you refer to as sold to Talent?

A. It refers to one of your telegrams.

By the COURT:

Q. I do not see the importance of that. Your answer is that you did not know what outlet he himself saw for the wool.

A. I did not.

Q. Therefore you did not counteract what he was doing?

A. Exactly.

By Mr. PETTIT:

Q. Do you want us to understand that you thought that he might have had an outlet in the West for the wool where he was?

135 A. I want you to understand simply that I didn't know why he was acting as he did act.

The COURT: He has said that he was authorized to sell as well as buy.

Mr. PETTIT: But he was in a place where he was buying and not selling.

The WITNESS: He was in telegraphic correspondence all the time with any Eastern man that he cared to—with anybody that he cared to at any time.

By Mr. PETTIT:

Q. Do you mean to tell the jury and the court that you had any idea that Mr. Toland was selling these wools that he was buying for your account?

A. I tell you again I don't know what he had in mind, as I told Mr. Junkin at the time, before Mr. Toland's return.

Q. Never mind what you told Mr. Junkin.

A. It was fresher in my mind at that time than it is now.

Q. You didn't know what Toland had in his mind?

A. No, sir.

Q. But you didn't stop him and didn't ask him why he was doing it?

136 A. Of course not, because I couldn't reach him any oftener than I did.

Q. He tells you every time where he is—he goes to Hugo and Byers?

A. I reached him just as often as I could.

Q. What did you pay for this telegram?

A. I can't tell you. The bill is there.

Mr. JUNKIN: $1.15 appears upon the face of the telegram.

Mr. PETTIT (to the witness, handing to him bill): State from that bill.

A. It was $1.15.

Q. I notice that in one of these bills of Denny, Rice & Company they sell some of this stuff at 15 cents fine and fine medium. What is the difference in the rest of it that they sell at 20 cents? What is the reason of that difference?

A. That only proves what I have already stated—that the difference is made up in the condition of the wool as determined by the shrinkage.

Q. You give the same explanation as you have given in regard to the other?

137 A. Yes, sir; just exactly. That was the bulk of the wool, by the way—that 15-cent sale by Denny, Rice & Company.

Q. The bulk of the wool brought only 15 cents?

A. Yes, sir.

Q. I inferred from what Mr. Schollenberger said that the allegation is that there was some extraordinary depression in the wool market about this time?

A. The two accounts, I should think, would prove whether or not that was the case—Denny, Rice & Company's account and Dr. Schollenberger's. You see they were made about the same time. They will prove that.

Q. Was there a depression or not?

A. There was a depression, as I have stated in my evidence that the wools were worth at the time of purchase from 16 to 18 cents, and I claim that when they arrived they were not worth over 15 cents, average.

By the COURT:

Q. Did they come down as soon as they could—in the usual course of trade?

A. Yes, sir; that is, it was rather an unusual depression in 1887.

Q. No, no; I mean to say did the wool come down to the

138 Eastern market as rapidly as usual?

A. Yes, sir; in from two to three weeks.

Q. In due course?

A. Yes, sir.

By Mr. PETTIT:

Q. At the very time of these purchases, I understand you to say, the Eastern market was not as good as the Western market, allowing for the freights?

A. No, sir; it wasn't.

Redirect examination.

By Mr. JUNKIN:

Q. You have spoken about the Eastern market at that time; what was the Eastern market value of these wools when they arrived here, in July?

A. I have said 15 cents.

Q. What was the Western market value at that time?

A. None of these wools, to my knowledge, were sold at over 11 to 12 cents there.

By Mr. PETTIT:

Q. Were you there?

A. I have been there several times since.

Q. At that time, do you know what the prices were there?

139 A. I wasn't there, but I know from my intercourse with all the different people that handle the wool there—growers and competitors.

Q. Where are these contracts; when was this wool deliverable; I mean the contracts on which you bought it?

A. They are here (producing same).

Q. What time was the wool deliverable?

A. It was deliverable when shorn; no special time named; deliverable when shorn and ready for the market.

Q. It reads, "Delivered on cars at Hugo Station, Colorado, on or before the 20th of July"?

A. Yes, sir.

Q. What was the price of wool at Hugo Station, Colorado, July 20th?

A. I claim that if there was a market at all, not over 11 to 12 cents for that same wool on July 20th.

Q. I do not ask you what you claim, but what you know. State from your knowledge. What do you know about it?

A. I only know what I have heard by my intercourse with growers there as to what they got for their wool and my competitors in that self-same section. There were no buyers at the time we bought it ourselves in Colorado—that is, none that were buying. Mr. Toland was taking everything that was offered, and there

140 was nobody that could touch it.

Q. He was cleaning the whole country?

A. Exactly.

Q. How can you say that as of the 20th of July? What was the grade of the Morgan & Orcutt clip?

A. I can only judge that by the sample.

Q. What was it?

A. Fine medium and fine; I should say, as they all run.

Q. State about the Morgan & Orcutt.

A. Fine medium and fine.

Q. They were those two grades?

A. Yes, sir.

Q. Do you mean to tell me that you remember now the price of those wools on the 20th of July at Hugo?

A. I do not mean to tell you anything of the kind. I tell you again all the knowledge I have I got from intercourse with the growers since and from my competitors. That's all I can tell you.

Q. That was since that time?

A. Yes, sir; of course it was. That same remark would hold good for not only the 20th of July, but all of July.

Q. You say you have heard that since. You did not know then what the price was, did you?

141 A. I didn't make any inquiry at that time. I was interested in fixing my matters up.

Q. How long afterwards was it—September or October?

A. I went out there in September.

Q. It was then that you got this information, was it?

A. No; I was out there in September of this year. I keep hearing of it every time I go out. I went out first after that time in the following June, I should say—a year after Mr. Toland had been there.

Q. That was your first visit to that country after that?

A. Not the first visit, but the first time I was brought in intercourse with any of these people.

Q. Was it then that you got this information?

A. Partly; yes, sir; principally then, I should say, and since also.

Mr. PETTIT: I ask your honor to strike out this testimony and would like a ruling upon my motion. I refer to the evidence as to value at Hugo.

The COURT: I will not strike it out. The witness was in the wool trade. He is presumed to know the value of wool throughout the country from his connection with the trade. The jury

142 will judge from his testimony whether or not he is able to speak on the subject of the price of wool on this particular day in the West, and will consider it in connection with what he has said about what he heard in the trade afterwards. You may make your motion and I will overrule it. I regard the whole inquiry as unimportant, because if these people sold the wool for the best price they could get for it, if there is nothing else in their way, that is all they were required to do.

Mr. PETTIT (to the witness): Your answer in regard to the lot of Morgan & Orcutt applies to the other lot, doesn't it?

A. Yes, sir.

Q. It isn't necessary, then, to go over them one by one as to each separate day. I notice some of them were the 9th.

A. Not unless you care to; I do not.

Mr. PETTIT: The witness states that he did not know this at the time. He states that he did not know, but acquired this knowledge a year afterwards, which is clearly a matter of hearsay.

143 I move to strike out the testimony of Mr. Primrose as to the value of wool purchased by Mr. Toland at the time and place of delivery agreed upon between him and his vendor.

(Objected to.) (Objection sustained.) (Exception by defendant.)

By Mr. JUNKIN:

Q. In June, July, August, and September of the year in controversy what knowledge had you of the market value of such wools as these, generally?

(Objected to as only competent in chief.) (Question allowed.)

A. My knowledge then was obtained as it is now and at all times from constant contact with all those interested in those particular kinds of wool, as well as any other kinds.

Q. You were dealing in this sort of wool during the whole of that summer?

A. Yes, sir.

Q. And this depression that Mr. Pettit has asked you about in the wool trade in the East took place about when—this unusual depression?

144 A. It commenced to take place in July. I can't tell just how long it followed.

Q. How long did it continue?

A. I don't know that I can say that; probably six months or more, probably. We didn't recover from it.

Q. Having been engaged in the business so long, does or does not a depression in the East here, such as took place in July and continued for some time, affect the price of such wools all over the country?

A. Most certainly.

By Mr. PETTIT:

Q. As I understand it, this depression had commenced at the time these purchases were made?

A. Some time after the 1st of July, I should say, whenever the money tightness was first noticeable in Boston. That was the primary cause.

Q. You have already stated, have you not, that at the time these wools were purchased they were not worth in the East the price paid for them by Mr. Toland plus the freight?

A. I do say that. They were never worth it.

Q. You have already stated that at the time Mr. Toland was purchasing these wools he was without competitors and was buying all there was?

145 A. Exactly.

Q. When the price in the East, at the seaboard, where wools are manufactured or exported (manufactured almost wholly, of course), is less than the price at the point of production, plus freight, isn't there always a depression in the market?

A. Certainly.

Counsel for plaintiff reads in evidence deposition of William G. Benedict, of Boston.

Plaintiff closes.

Defendant moves for nonsuit.

The COURT: We all know that this method of transmitting messages is imperfect; that atmospheric disturbances, disturbances produced by the wind and by other causes—the condition of the instrument—all outside of the conduct and control of the operators—may produce at the end of the line a difference. These are causes of change in the message, over which neither the company nor the operator have any control. It is upon that ground that the courts hold that the mere fact that a message as received does not correspond to the message transmitted is not sufficient evidence upon which to hold the company liable for damages. That is the ground upon which these cases all rest.

146

I remember very well trying a suit early in the history of telegraphy when this question was not raised. It was submitted to the jury by counsel and by the court. A man in the West sent on a drove of cattle to his factor here in the East and ordered them sold at a certain price. When the message was received it was inaccurate, as delivered to the factor. It named a price at which the cattle might be sold, much below the price contained in the message delivered to the office. The question here presented was not raised, but counsel went to the jury, and the court instructed the jury, in accordance with the address and argument of counsel, that the mere circumstance that the message delivered was not the message that was transmitted or directed to be transmitted was not conclusive. That was the instruction I gave the jury in that case—that it was not conclusive, but that it was for the jury, in connection with all the circumstances, to say. Since that time all these decisions have been made, and the courts in these cases prefer to hold that it is not only not conclusive, but of itself it is too unsafe to trust to a jury.

147

The telegraph companies are bound to exercise that care which the danger of mistake in what they undertake to do requires, and that is all.

There are two circuit court decisions here that I understand rule on this question, and it is the practice on this circuit from which we have never departed; (we may do so in this case—I do not know that yet) but it is the rule, from which we have never departed, to follow the rule of the circuit courts where it is uniform, so that suitors in the Federal courts may not encounter two rules of law in the same class of cases and involving the same facts. And even where a circuit court is unable to thoroughly satisfy itself of the accuracy of the interpretation of the law by another circuit court, it follows a decision made under precisely similar circumstances governing the same question; because were it to do otherwise there would be conflict and confusion in the administration of law through the Federal courts, and it is better where the mind of the judge is not able fully to assent to the

148

correctness of the decision to follow it and allow parties to seek a remedy, if entitled to one on review, than to subject suitors to such uncertainty and confusion.

More than once have I in admiralty followed the district court and the circuit court in review in other districts and other circuits without being able to satisfy my mind fully that the line of decision was right because of the importance I attach to the agreement of decision in the Federal courts. Otherwise you would have, as I have unfortunately seen, a question involving a patent decided one way in one circuit and in another way in another between different suitors. That is a thing that is disgraceful to the court, in my judgement, and which we are and have been very cautious to avoid.

This is a question that must be determined in the cause, and if determined for the defendant of course it is fatal. The court might proceed, reserving it and hearing the evidence and taking a verdict subject to the judgment of the court upon this question, but
149 we are in such a situation that I think we can give the subject our deliberate judgment after consideration as well without pursuing that course and deciding it at this stage of the case. If it meets the approbation of counsel I will let the jury go until Tuesday next, and will take the briefs of counsel and look at the question thoroughly. By that time I will be able to determine how this court ought to decide. This is the proper time, I may say, to offer further proof if you desire to do so.

Counsel for plaintiff offer in evidence and read depositions of S. D. Stevens and E. M. Smith.

(Adjourned to Tuesday, April 16th, 1889.)

150 *Copy of Original Message, with All Matter Contained on the Face of Blank.*

The Western Union Telegraph Company.

Thos. T. Eckert, general manager. Norvin Green, president.

Receiver's No.	Time filed. 13.	Check.

F. N.

Send the following message, subject to the terms printed on the back hereof, which are hereby agreed to :

JUNE 16, 1887.

To Wm. B. Toland Ellis Kansas

Despot am exceedingly busy Bay all kinds Quo Perhaps Bracken half of it — Mince moment promptly of purchases

FRANK J. PRIMROSE.

☞Read the notice and agreement on the back of this blank.☜

18 words.
Charge, 1.15.

151 *Copy of Matter Contained upon Back of Original Message Form or Blank.*

All messages taken by the Western Union Telegraph Company subject to the following terms:

To guard against mistakes or delays the sender of a message should order it repeated—that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of this company can be insured by contract, in writing, stating agreed amount of risk and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: One per cent. for any distance not exceeding 1,000 miles and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender.

152 Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented, in writing, within sixty days after sending the message.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

153 *Copy of Message as Received by W. B. Toland, with All Matter upon Face of Blank.*

Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message and is delivered by request of the sender under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Number. Rt.	Sent by S.	Rec'd by F. N.	Check. 22. Collect 3 extra words.

Received at 5 K p. m., June 16, 1887.
Dated Philadelphia, Pa., 16. Forwarded from Ellis.

To W. B. Toland Waukeeney Ks

Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase

FRANK J. PRIMROSE.

154 *Copy of Deposition of S. T. Stevens.*

S. T. STEVENS, a telegraph operator, of Somerville, Ohio, aged 23 years, being duly and publicly affirmed, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

(1.) To the first interrogatory he saith:

"My name is S. T. Stevens; my age, 23 years; my occupation, telegraph operator for the Cincinnati, Hamilton & Dayton Railroad Company at Hamilton, Ohio; my residence is Somerville, Ohio."

(2.) To the second interrogatory he saith:

"I was a telegraph operator in the employ of the Union Pacific Railroad Company, Kansas division, at its office at Brookville, Kansas, on the 16th day of June, 1887, and in that capacity, by virtue, as I suppose, of an arrangement between the Western Union

Telegraph Co. and the Union Pacific Railroad Co., I served as telegraph operator at that station for the business of the Western Union Telegraph Co. I was on the pay-roll of the Union Pacific Railroad Company and served as an operator, handling the business of that company and also the business of the Western Union Telegraph Co., the same as if I had been directly in the employ and on the pay-roll of the Western Union Telegraph Co. Brookville, Kansas, was what is known as a 'relay station' on the line of the
155 Western Union Telegraph Co., which means that the circuit between Kansas City and Denver was so long that all messages were repeated from Brookville for points west."

(3.) To the third interrogatory he saith:

"On the day named Joseph Tindall was an operator at the Brookville office, who was at the end of the east wire, where he received the messages sent to Brookville from Kansas City. I was in charge of the west wire, and sent out from Brookville over that wire to points west the messages received by Tindall which were to be transmitted west. I recognize the paper which is shown me by the commissioner. It is the copy made by Operator Tindall of a message received on that day from Kansas City. He handed this copy to me for transmission of the message to Ellis, Kansas, and I did transmit it from Brookville, Kansas, to Ellis, Kansas. Said paper is in the handwriting of said Joseph Tindall. I mark the same for identification by writing my name upon the back thereof under the certificate of the commissioner this 22nd day of September, 1888, and I attach said paper to this my deposition."

(4.) To the fourth interrogatory he saith:

"Said paper is the copy made by said Joseph Tindall and handed by him to me of a message received by him from Kansas City on said 16th day of June, 1887, for transmission by me to Ellis, Kansas. I identify the paper by the mark "R. T. Q., 1542 A," all of which letters and figures are in my handwriting and were placed
156 by me on said paper on said 16th day of ——, 1887, at the time of transmitting the message from Brookville to Ellis.

'R. T.' signifies the office calling for Ellis; 'Q.' signifies the letter used by Operator E. M. Smith at Ellis, Kansas, and placed on this paper signifies that he answered to me that he had received the message; 15.42 means the hour, according to the 24-hour system, at which I transmitted the *the* message from Brookville to Ellis, which is equivalent to 3.42 p. m. The "S." stands for my name and was the letter by which I was designated. This "S." so placed upon this paper signifies that I sent the message. It was according to the usual course of business to place on each message sent by an operator letters and figures such as are found on this paper, indicating where it was sent; that the operator to whom it was sent acknowledged its receipt; the hour at which it was sent, and the operator who sent it."

(5.) To the fifth interrogatory he saith:

"I did transmit the message (a copy of which has just been shown to me and which is referred to in my two preceding answers) to

Ellis, Kansas, at 3.42 p. m. on June 16, 1887. I transmitted said message exactly and word for word as it is written on said paper.

(6.) To the sixth interrogatory he saith:

"The office of the Western Union Telegraph Company at Brookville, Kansas, on June 16, 1887, was provided with the patent
157 steel-lever keys, which are the best known, and the equipment was in every respect, with reference to sufficiency and condition, first class. I cannot, at this moment and without reference to records, state what was the condition of the wires between Brookville, Kansas, and Ellis, Kansas, on that day, but I have no recollection of their being otherwise than in first-class condition."

(7.) To the seventh interrogatory he saith:

"I have been a telegraph operator and employed continuously as such from December 22, 1883, to the present time. My first employment was on the Grand Rapids & Indiana railroad at Richmond, Ind., and subsequently with the Cincinnati, Hamilton & Indianapolis Railroad Company at Rushville and Connersville, Ind. I have occupied positions in which only first-class men are employed, and I consider myself and think I am so generally considered by other telegraph operators a number one railroad operator. I have letters of recommendation from every one for whom I have worked. I am sure I could go to any one for whom I have worked and obtain employment."

Cross-examination:

(1.) To the first cross-interrogatory he saith:

"I have been a telegraph operator, as I have already said, since December 22, 1883. I worked first for the Grand Rapids & Indiana Railroad Company at Richmond from December 22,
158 1883, until May 1, 1884. From May 1, 1884, until December 1, 1886, I worked for the Cincinnati, Hamilton & Indianapolis railroad; six months of that period at Rushville and the rest of the time at Connersville, Ind. I went into the employ of the Union Pacific Railroad Company, going to the relay station at Brookville, Kansas, on June 6, 1887. I remained at the relay station until July 6th, 1887, when I was sent to Ellis on account of the illness of the operator there. I remained there until July 24, and then came East, having been employed since that time by the C., H. & R. R. R. Co. Between December, 1886, and the first of June, 1887, I was not continuously employed. I did some work during that time for the C., H. & D. R. R. Co. at its general office in Cincinnati. I am now in the employ of the C., H. & D. R. R. Co. and have been since July, 1887.

I learned the business of a telegraph operator in the telegraph office of the C., H. & D. R. R. Co. at Somerville, Ohio. I was taught by C. A. Hinsey, the operator at that office. I received instruction from him for five months before taking employment as an operator myself."

(2.) To the second cross-interogatory he saith:

"I first saw said paper mentioned in the third and fourth inter-

rogatories on June 16, 1887, when it was handed to me, at Brookville, Kansas, by Operator Joseph Tindall, to be forwarded by me to Ellis, Kansas. I have not seen said paper from that day until
159 to-day, when it was shown to me by the commissioner at his office. I could not, without the aid of the paper, have stated that I received that message from Operator Tindall or that I forwarded it. In other words, I could not have repeated the message from memory without the paper before me or having recently had it read to me."

(3.) To the third cross-interrogatory he saith:

"As I have already stated, I would not, without the production of the paper, have a distinct recollection of having received the paper from Operator Tindall and of having sent it to Ellis, Kansas; but now, that the paper is before me, I recollect perfectly well that I did receive that identical paper from Operator Tindall and that I did transmit the message to Ellis, Kansas. My answer is doubtless based largely, although not wholly, upon the confident belief which I have that I did carefully what I did and what it was my duty to do. I have been told that when the message was received by Mr. Toland the first word, 'despot,' was changed to 'destroy' and the fifth word, 'bay,' to 'buy.' I know that I transmitted both of these words as they appear upon the paper now before me and that I did not transmit 'destroy' for 'despot' nor 'buy' for 'bay.' I have received and transmitted very many messages during my employment as a telegraph operator. I cannot answer more fully with respect to the clearness of my recollection of this particular message than I have already answered. My attention was first called
160 to this message by I. N. Miller, general superintendent of the Western Union Telegrrph Co. at Cincinnati, in March, 1888, by a letter written by him at Cincinnati to me at Somerville."

(4.) To the fourth cross-interrogatory he saith:

"I have no correspondence or interviews with any one with reference to the message or matters inquired about in this commission except the letter of said I. N. Miller, received last March. I have not the letter with me and therefore cannot annex a copy of it. Whether or not it is at my home in Somerville I cannot definitely say. I have no copy of my answer thereto."

(5.) To the fifth cross-interrogatory he saith:

"I have not, as I have said, a distinct recollection of the wires between Brookville and Ellis on June 16, 1887. As to the condition and sufficiency of equipment at the Brookville office on that day and at all times during my connection with that office I have a very distinct and accurate recollection."

(6.) To the sixth cross-interrogatory he saith:

"I received the message inquired about in the third and fourth interrogatories by sound."

161 *Copy of Deposition of E. M. Smith.*

First. To the first interrogatory he saith:

My name is E. M. Smith; my age is 21 years; my occupation is that of a station agent and telegraph operator, and my residence is Bunker Hill, Russell county, Kansas.

Second. To the second interrogatory he saith:

On June 16th, 1887, I was a telegraph operator on the telegraph line of the Western Union Telegraph Company, employed by the Union Pacific Railway Company, and at work in such capacity at Ellis, Kansas. The Western Union Telegraph Company did then and now still operates all the telegraph lines along the Union Pacific Railway Company's tracks, and I was engaged as operator for said telegraph company, but received my salary from the Union Pacific Railway Company, there being some sort of an arrangement between the railway company and the telegraph company whereby all operators received their salaries from the former.

Third. To the third interrogatory he saith:

I recognize the paper shown me by the commissioner as an impression copy of a message received by me as operator at Ellis Kansas, on June 16th, 1887, from Brookville, Kansas, and sent from, Brookville by an operator whose personal signal was "S." I am quite certain it is in my handwriting. It certainly resembles my writing so — that I cannot find or discover anything to lead
162 me to suspect or believe it to be anything else than an impression copy of the message as received and written out by me. I have marked the paper alluded to in this answer for identification thus, "Exhibit A, E. M. Smith," and attached it hereto.

Fourth. To the fourth interrogatory he saith:

It appears to be and I am very certain it is a full and correct copy of the message received by me at Ellis, Kansas, from Brookville, Kansas, on June 16th, 1887, as stated in my previous answer. I received the message by sound from Brookville, Kansas, and it was written down by me as I received it from the instrument and the impression copy was made immediately thereafter. I made no change between the message as received by me and this paper, but wrote it down, word for word, just as it was received.

Fifth. To the fifth interrogatory he saith:

I transmitted the message to Waukeeney, Kansas, one hour and twenty minutes after I received it at Ellis, Kansas, by direction of another telegraph operator named Cale, then employed in the Ellis office, to whom Mr. Toland, as Mr. Cale informed me, had given orders to forward any messages which *which* might come for him to Waukeeney. I transmitted the message exactly as I had received it.

Sixth. To the sixth interrogatory he saith:

The equipment for telegraphic purposes of the Western
163 Union office at Ellis, Kansas, on June 16th, 1887, was in first-class condition and amply sufficient for the business then

transacted through it. I am unable to recall what the condition of the wire between Ellis and Brookville was on that day.

Seventh. To the seventh interrogatory he saith:

I have been steadily employed as a telegraph operator except when sick or taking a vacation, amounting to all to less than 100 days lost time, since June, 1886. On June 16th, 1887, I considered myself a competent operator. The Ellis, Kansas, office then paid $60 per month salary, which amount was above what the average operator at that time received.

Cross-interrogatories:

First. To the first cross-interrogatory he saith:

Since the early part of June, 1886, I had learned telegraphy and been employed at a few jobs prior to that time, but had no steady employment. I was then employed at Concordia, Kansas, and remained there under such employment as a telegraph operator until December 23, 1886. I then took a vacation until January 10 or 11, 1887, when I resumed work as an operator at Manhattan, Kansas, and remained there until January 20, 1887, when I was transferred to Solomon City, Kansas, where I remained 4 or 5 days, and was transferred to Agate, Colorado, where I remained about 1 week. About February 1st, 1887, I went to Ellsworth, Kansas, and was employed at that place; at Ogallat, Kansas, and Ellis, Kansas, as an
164 operator until June 30, 1887. I was then taken ill and did no further work until September 3, 1887, when I took charge of the telegraph office at Kit Carson, Colorado. I was soon transferred to Bunker Hill, Kansas, where I still remain. I am now and have been at all times when employed as a telegraph operator since June, 1886, in the employ of the Union Pacific Railway Company and operating on the lines of the Western Union Telegraph Company, as stated in answer to direct interrogatory No. 2.

I received instruction in telegraph at Sherman Company's school at Oberlin, Ohio, for five months. From November, 1885, until June, 1886, I studied telegraphy, practiced and received instructions from J. H. Kelly, operator at the depot at Concordia, Kansas.

Second. To the second cross-interrogatory he saith:

I never saw the paper mentioned after June 16, 1887, until to-day. The first time after the impression copy was made, that my attention was called to that paper, was to-day, when it was handed me by the commissioner. My recollection of the message received by me and inquired about in the fourth interrogatory was not distinct enough that I could have repeated it from memory.

Third. To the third cross-interrogatory he saith:

My recollection of that message is somewhat indistinct. I know I was always very careful in such matters, and am fully satis-
165 fied in my own mind that the message was written down and transmitted by me just as received. I have received and transmitted thousands of messages, and it would be impossible for me to distinctly recollect each one, and I cannot state that all the circumstances surrounding this message would have been clear in

my mind were my recollection not refreshed by examination of the impression copy mentioned above. After June 16th, 1887, my attention was not called to the message until about 6 months ago, when the operator at Ellis, Kansas, and soon afterwards Mr. McCune, chief dispatcher of this division of the Union Pacific railway, telegraphed me asking if I recollect the circumstances connected with it.

Fourth. To the fourth cross-interrogatory he saith:

I have no correspondence or interviews with any person regarding the message or matter inquired about under this commission except the two messages mentioned in the preceding answer. I did not write out those dispatches, hence cannot give copies of same, but their substance was as stated in preceding answer.

Fifth. To the fifth cross-interrogatory he saith:

I cannot recollect and will not undertake to tell the condition of the wires on the days mentioned.

(Signed) E. M. SMITH.

166 PRIMROSE *vs.* THE WESTERN UNION TELEGRAPH COMPANY. } U. S. C. C. McKennan and Butler, JJ.

TUESDAY, *April 16th*, 1889.

BUTLER, *J.*:

I wish to inquire of plaintiff's counsel whether or not they assent to the proposition that the court enter a nonsuit in case the judgment of the court is with the plaintiff, respecting the question of recovery of anything beyond the price of the message.

You will observe that the question discussed is the question that arises out of the agreement on the back or connected with the message, and that agreement, in the judgment of the court, has no application to the price paid for the message. It is intended to guard against recovery of damages beyond the amount paid for the message; and if the court is of the opinion that there is no evidence in the case of gross negligence, and therefore that there can be a recovery of nothing beyond the price of the message, if this suit can be regarded as a suit in which a recovery may be had of damages equal to the amount of the message, the plaintiff
167 would still be entitled to a verdict for that.

I do not suppose counsel had it in their minds when they brought this suit to recover the amount paid for the message. It depends upon the view of counsel, probably upon both sides, whether the court can enter the nonsuit or not.

Mr. JUNKIN: I do not know exactly what your honor's thought is. Our idea was this: There are two or three exceedingly important questions that are fairly raised in this case which have never been passed upon, so far as we have been able to find, by the Supreme Court of the United States or very distinctly by any circuit court, and we thought it was a case in which we ought to be allowed to recover—that if there ever was a case which ought to be put in such a shape that it could be carried to the Supreme Court with all

the questions, so as to have it decided authoritatively by the court whose jurisdiction extends all over this broad land, that your honors would put it in such shape. We thought, secondly, if your honors please, that, as it was a matter of considerable expense, even
168 though your honors might have a doubt whether we ought to recover in the first place, that you would probably be inclined to throw the doubt in our favor, rather than against us.

BUTLER, J.: We have passed upon all that. The only question is whether or not you desire to press this suit for the recovery of damages equal to the $1.15 which you paid for this message.

Mr. JUNKIN: I do not suppose that would help this poor fellow, who has been broken up by what has happened.

BUTLER, J.: Unless it covers costs. I have nothing to say about that, however. I do not suppose that you had this in your mind at all, and when the question for nonsuit was argued no reference was made to it, but since I have looked at the agreement, out of which the question arises, I see this aspect of the case.

Mr. PETTIT: If your honors please, it would be beneath the jurisdiction of the court. They could not get around it by suing for a larger amount. It is a contract for $1.15 on the back of it.

BUTLER, J.: These parties are within the State on both
169 sides, are they?

Mr. PETTIT: No, sir.

Mr. JUNKIN: Our client has been compelled to reside in Chicago. We have no remedy beyond this. We cannot go to the Supreme Court.

BUTLER, J.: This aspect of the case did not occur to my mind in thinking of it.

170 BUTLER, J.: This suit is to recover compensation for loss sustained by the plaintiff in consequence of a mistake made by the defendant company in transmitting his message by telegram. The consequences of the mistake were very serious and entailed great loss on him.

On the back of the message is this language:

"To guard against mistakes or delays the sender of a message should order it repeated—that is, telegraphed back to the original office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond fifty times the sum received for sending the same, unless specially insured nor in any case for delays," etc.

This provision on the back of the message is referred to on
171 the face and appears above the name of the plaintiff to the message: "Send the following message, subject to the terms printed on the back hereof, which are hereby agreed to."

The message, in this instance, was partly in ordinary English

and partly in language understood only by the sender and his agent to whom it was sent. The word "bay," which was understood by these individuals, but which bore no signification whatever to the telegraph operator, was used in connection with the words "wool of every description," or language to that effect. The word in transmission was changed to "buy," and the consequences of this change were, as I have suggested, most serious to the plaintiff.

The question before us arises out of this agreement. The precise question has been repeatedly before the State courts of last resort and decided. Our difficulty at present grows out of the conflict in these decisions. A majority, a clear distinct majority, of the courts have held that such an agreement is reasonable, and is therefore binding upon the parties, except as regards errors that
172 result from gross or wilful neglect, and they furthermore hold that an error in the transmission of a message is not of itself evidence of such gross negligence.

A minority of the courts, just as respectable, hold that the agreement is without any effect whatever where the error results from negligence, and that consequently an error appearing in the transmission of the message is evidence of negligence for the consideration of the jury.

If there was nothing more I might entertain doubt respecting what should be done. It is certainly open to grave doubt which of these two lines of decision are best supported by reason. But I find that the question has been twice before the Federal courts in the circuits, and that while one of these cases is so imperfectly reported that it appears as if the court had submitted the question to the jury where there was no other evidence, after having said that there is no evidence in the case that will warrant a finding, there is another case in which the court, following the view expressed by the judge in the case first alluded to, took the case from
173 the jury, charging it, holding, with the majority of the State courts, that the agreement is reasonable; that it does exempt and guard the company from the consequences of negligence resulting in error, except where the negligence is the result of gross error; and further charging the jury that the appearance of error in the message alone is not evidence for the consideration of the jury. In view of what is thus decided in the Federal courts and of the importance of uniformity in the decisions of these courts—not because of a feeling of comity to which our following each other in the circuits is sometimes ascribed, and very improperly ascribed, but because of the importance of certainty and uniformity in the administration of law in these courts, I am constrained, without any expression of my own judgment, to follow what is thus decided.

I do not find in this case any evidence whatever of negligence except that which appears from the change in the message in course of transmission. The only other thing pointed out by counsel supposed to bear upon the subject is the fact that in the trans-
174 mission of the message from this city to Brookville, Kansas, no error of importance occurred—that probably one unimportant error did occur—and that in the transmission of the mes-

sage from Brookville to Ellis, a comparatively short distance, two errors occurred, one of them being the important error to which I have referred. These facts, however, were shown by the company's operators at the two offices referred to, Brookville and Ellis. These officers testified that the instruments there in use were such as are commonly employed, and that they were in good order; they testified also that they were careful, that they were not negligent, and I incline to think this testimony rather tends the other way. I do not think it adds anything to the fact that there was an error in the transmission of the message.

The case therefore stands nakedly upon the fact that an error, a most important error, was committed in the transmission of this message; and it is to be borne in mind, as before suggested, that this is an error in a word that had no signification whatever to
175 the operator. This tends just to that extent to excuse the company.

Under the circumstances and for the reasons stated I am constrained to grant the motion for a nonsuit. A nonsuit will therefore be entered.

White *vs.* Telegraph Co., 14 Fed. Rep., 710.
Jones *vs.* Telegraph Co., 18 Fed. Rep., 717.

Mr. JUNKIN: May I ask your honor whether, in order to enable us to take this question to the supreme court, if my client can raise the money to pay the costs, your honor would not give a binding instruction to find for the defendant.

BUTLER, J.: We cannot do that upon a motion for a nonsuit. Of course we could if the plaintiff had asked us to charge the jury, and he may withdraw his motion now; but will it do you any good?

Mr. JUNKIN: I hope it will, though I have not had time to consider the matter. I am a little surprised at your honor's decision, and am therefore not prepared to answer your honor's question on the spur of the moment.

176 BUTLER, J.: There is no doubt about the power of the court to direct a nonsuit; that is well settled. The only embarrassing thing that I have found in the case is the one to which I have alluded, and I think that drops out when you come to consider that the sum paid for the message is below the amount necessary to give the court jurisdiction. I should be very willing to aid you in getting the case up and getting it in such shape that this question cannot be escaped, and I will do anything now or hereafter, if I can, to aid you in that regard. If I could see any benefit to the plaintiff to be derived from allowing the nonsuit to be withdrawn and giving a binding instruction to the jury, I should certainly favor that course. I do not, however, see how you will be benefited.

Mr. PETTIT: I am willing to assent to Mr. Junkin's desire. We would like to have the case taken up and I will withdraw my motion with that view.

Mr. JUNKIN: We have given in evidence on our part two of their depositions. We offered them for the plaintiff; that, I think, would

put it in better shape. I do not know that my client can
177 raise enough money to pay the costs to go to this high tribunal. We have no other evidence.

BUTLER, J.: I am persuaded that it makes no difference, but whatever counsel desires shall be done.

Mr. JUNKIN: Then we should prefer to have it as we have suggested.

BUTLER, J.: Gentlemen of the jury, for the reasons just stated in your presence the court directs a verdict in this case for the defendant, there being no evidence before you upon which the plaintiff can recover.

(Exception by plaintiff.)

Plaintiff's counsel moves for new trial.

178 And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided, and thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 26th day of April, A. D. 1889.

WM. BUTLER, *J.* [SEAL.]

179 Endorsed: In the United States circuit court for the eastern district of Pennsylvania, Philadelphia county, October sessions, 1887. No. 65. Bill of exceptions. Frank J. Primrose, a citizen of the State of Pennsylvania, *vs.* The Western Union Telegraph Company, a corporation of the State of New York and a citizen thereof. Sealed by the court and filed Apr. 26, 1889. Samuel Bell, clerk. Agreed to. Read & Pettit, for def't. Joseph de F. Junkin, George Junkin.

180 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

FRANK J. PRIMROSE, a Citizen of the State of Pennsylvania, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, a Corporation of the State of New York and a Citizen Thereof.	No. 67. October Sess., 1887.

Know all men by these presents that we, Frank J. Primrose and The Real Estate Trust Co. of Philadelphia, are held and firmly bound unto The Western Union Telegraph Company in the full and just sum of five hundred dollars, to be paid to the said The

Western Union Telegraph Company, certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of September, A. D. 1889.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Frank J. Primrose, a citizen of the State of Pennsylvania, plaintiff, and The Western Union Telegraph Company, a corporation of the State of New York and a citizen thereof, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Western Union Telegraph Company,
181 citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Frank J. Primrose shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK J. PRIMROSE. [L. S.]
THE REAL ESTATE TRUST CO. OF PHILADELPHIA,
By FRANK K. HIPPLE, *Pres't.*

Attest: WILLIAM R. PHILLER,
Secretary. [CORPORATE SEAL.]

Sealed and delivered in presence of—
HARRY McFARLAND.
J. D. F. JUNKIN.

Approved:
WM. BUT-ER, *Judge.*

[Endorsed:] No. 65. October sess., 1887. Circuit court United States. Primrose *vs.* Western Union Telegraph Company. Bond surwrit of error. Filed Nov. 8, 1889.

182 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Frank J. Primrose *vs.* The Western Union Telegraph Company, No. 65, October

session, 1887, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 8th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 13,923. E. Pennsylvania C. C. U. S. No. 290. Frank J. Primrose, plaintiff in error, *vs.* The Western Union Telegraph Company. Filed November 19, 1889.

In the Supreme Court of the United States, of October Term, 1892.

FRANK J. PRIMROSE, Plaintiff in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error. } No. 290.

And now, to wit, this 9th day of October, 1893, it is hereby agreed between counsel that—

Whereas the impression copy of telegram in question received by Operator Stevens and forwarded by him and that received by Operator Smith and forwarded by him, both — which are attached to the depositions of said Stevens and Smith and are filed in the circuit court of the United States for the eastern district of Pennsylvania, have been omitted by mistake in making up the record of this case:

The said record is now amended by adding thereto copies of said copies as follows:

Copy of Message Received by Operator Stevens at Brookville, Kansas.

" PHILADELPHIA, PA., 6, '16.

" Wm. B. Toland, Ellis, Kansas:

" Despot am exceedingly busy bay all kinds Quo perhaps Bracken half of it mince moment promptly of purchases.

" FRANK J. PRIMROSE.

" R. T. Q. 15–42 S."

Copy of Message Received by Operator E. M. Smith at Ellis, Kansas.

" R. K. June 16 7 S. Q.

" PHILADELPHIA, PA., 6, '16.

" Wm. B. Toland, Ellis, Kansas:

" Destroy am exceedingly busy buy all kinds quo perhaps Bracken half of it mince moment promptly of purchases.

" FRANK J. PRIMROSE."

Witness our hands:

JOSEPH DE F. JUNKIN,
For GEORGE JUNKIN,
Attorney for Plaintiff in Error.
SILAS W. PETTIT,
Attorney for Defendant in Error.

[Endorsed:] Case No. 13,923. Supreme Court U. S., October term, 1893. Term No., 59. Frank J. Primrose, P. E., *vs.* The Western Union Telegraph Co. Stipulation & addition to record. Filed Oct. 13, 1893.

In the Supreme Court of the United States, of October Term, 1892.

FRANK J. PRIMROSE, Plaintiff in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant in Error. } No. 290.

And now, to wit, this 9th day of October, 1893, it is hereby agreed between counsel that—

Whereas the impression copy of telegram in question received by Operator Stevens and forwarded by him and that received by Operator Smith and forwarded by him, both — which are attached to the depositions of said Stevens and Smith and are filed in the circuit court of the United States for the eastern district of Pennsylvania, have been omitted by mistake in making up the record of this case:

The said record is now amended by adding thereto copies of said copies as follows:

Copy of Message Received by Operator Stevens at Brookville, Kansas.

"PHILADELPHIA, PA., 6, '16.

"Wm. B. Toland, Ellis, Kansas:

"Despot am exceedingly busy bay all kinds Quo perhaps Bracken half of it mince moment promptly of purchases.

"FRANK J. PRIMROSE.

"R. T. Q. 15–42 S."

Copy of Message Received by Operator E. M. Smith at Ellis, Kansas.

"R. K. June 16 7 S. Q.

"PHILADELPHIA, PA., 6, '16.

"Wm. B. Toland, Ellis, Kansas:

"Destroy am exceedingly busy buy all kinds quo perhaps Bracken half of it mince moment promptly of purchases.

"FRANK J. PRIMROSE."

Witness our hands:

JOSEPH DE F. JUNKIN,
For GEORGE JUNKIN,
Attorney for Plaintiff in Error.
SILAS W. PETTIT,
Attorney for Defendant in Error.

[Endorsed:] Case No. 13,923. Supreme Court U. S., October term, 1893. Term No., 59. Frank J. Primrose, P. E., *vs.* The Western Union Telegraph Co. Stipulation & addition to record. Filed Oct. 13, 1893.

15-4-1

CASE No. 13,923.

APR [illegible]
JAMES H. McKE[illegible]

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 290.

FRANK J. PRIMROSE, Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF PLAINTIFF IN ERROR.

JOSEPH de F. JUNKIN,
GEORGE JUNKIN,
For Plaintiff in Error.

In the Supreme Court of the United States.

FRANK J. PRIMROSE, *Plaintiff in Error,*	OCT. TERM, 1892.
vs.	
THE WESTERN UNION TEL. CO., *Defendant in Error.*	TERM NO. 290. CASE NO. 13,923.

STATEMENT OF THE CASE.

On January 25, 1888, Frank J. Primrose, a citizen of Pennsylvania, the Plaintiff in Error, and who was Plaintiff below, brought suit in the U. S. Circuit Court for the Eastern District of Pennsylvania, against "The Western Union Telegraph Company," a Corporation of the State of New York, to recover damages for injuries resulting to him from an error occurring in the transmission of a telegraphic message sent by him from Philadelphia to Kansas, over wires of, or under the control of, the said Company.

The cause was tried at Philadelphia in April, 1889, and upon the conclusion of the testimony on behalf of Plaintiff, the Defendant offering no testimony, BUTLER, J., who tried the cause, sitting as Circuit Judge, directed the Jury to find for the Defendant, stating to the Jury (p. 74 of Record), "The Court di-
"rects a verdict in this case for the Defendant, there being no
v idence before you upon which the Plaintiff can recover."

Exception to this action of the Court was taken and duly sealed, a new trial was refused, and this writ of error was then sued out by the Plaintiff, the only Specification of Error being to the action of the Court in directing the verdict as above.

As disclosed by the Plaintiff's evidence (pp. 9 to 70 of Record), the facts of the cause, pertinent to the present issue, are briefly as follows:

Frank J. Primrose, the Plaintiff, was engaged in the business

of buying and selling wool, in the City of Philadelphia. Early in June, 1887, he sent one of his employees, William B. Toland, to Kansas to purchase wool for him, with instructions to buy 50,000 pounds and then wait for further orders.

Toland went to Kansas, bought the 50,000 pounds, reported the purchase to his principal, and then stopped buying.

On the morning of June 16, 1887, Primrose wrote, with extreme legibility, a message upon a printed blank of the Western Union Telegraph Co., a portion of such message being in cipher or code words, the meaning of which was privately known only to himself and Toland. He took or sent the paper to an accredited officer of the Defendant Company in Philadelphia, who received it for transmission, subsequently accepted the usual rate of pay for the same, and started the transmission of it.

For the convenience of the Court the telegraphic blank thus used and accepted is here produced from the Record (pp. 62 and 63) the words in italics being the words written thereon by Primrose.

THE WESTERN UNION TELEGRAPH COMPANY.

THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

Receiver's No.	Time Filed	Check
	13	

SEND *the following message subject to the terms on back hereof, which are hereby agreed to,* *June* 16, 1887.

To *Wm. B. Toland, Ellis, Kansas.*

Despot	*am*	*exceedingly*	*busy*	~~*Buy*~~ *Bay*
all	*kinds*	*Quo*	*Perhaps*	*Bracken*
half	*of*	*it*	*Mince*	*promptly*
of	*purchases*			

FRANK J. PRIMROSE.

READ THE NOTICE AND AGREEMENT ON BACK OF THIS BLANK.

The following appeared on back of blank.

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz, one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

Upon the evening of the same day, June 16, 1887, a duly accredited agent of the defendant company delivered to Toland, at Waukeney, Kansas, upon a blank of the defendant company, the message sent by Primrose, altered as to three words therein, and one letter omitted in address.

A copy of the blank thus delivered to Toland is here reproduced (p. 64 of Record), the altered words being in capitals, and the letter *m* being left out in address after *W.*

THE WESTERN UNION TELEGRAPH COMPANY.

This Company **TRANSMITS** and **DELIVERS** messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of **Unrepeated Messages**, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an **UNREPEATED MESSAGE**, and is delivered by request of the sender, under the conditions named above.

THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

NUMBER.	SENT BY	REC'D BY	CHECK.
Rt.	*S.*	*F. N.*	22 *Collect 3 extra words.*

RECEIVED at 5 *K. p. m.* *June* 16, 1887.

Dated *Philadelphia*, 16. *Forwarded from Ellis.*

To *W. B. Toland,*

Waukeeney, Ks.

DESTROY, am exceedingly busy, BUY all kinds, quo perhaps bracken, half of it mince, moment promptly of PURCHASE.

FRANK J. PRIMROSE.

It will be thus seen that for the words "DESPOT," "BAY" and "PURCHASES" sent by Primrose the company delivered the words "DESTROY," "BUY" and "PURCHASE."

The interpretation by code of the telegram as sent by Primrose was (p. 12 of Record):

"*Am exceeding busy. I have bought all kinds;* 500,000 "*pounds; perhaps we have sold half of it; wire when you do* "*anything; send samples immediately, promptly of purchases.*"

And of the message as delivered to Toland was (p. 16 of Record):

"Your telegram of the 17 *received; am exceeding busy;*
"Buy all kinds; 500,000 pounds; perhaps we have sold half of
"it; wire when you do anything; send samples immediately,
"promptly of purchase."

The changes in the first and last words did not materially affect the result to plaintiff; but the change in the word "BAY" to "BUY" resulted in the financial ruin of Primrose.

His agent immediately acted upon the instruction to *buy* all kinds of wool to the extent of 500,000 pounds, and before Primrose could stop him had purchased between 300,000 and 400,000 lbs. of wool at the ruling prices in Kansas, much above that in the East, and the testimony admitted by the Court below showed that Primrose had sustained an actual money loss of between $20,000 and $30,000, besides his consequential damages, evidence as to which latter the Court refused to admit.

The facts disclosed at the trial as to the original sending, transmission and delivery of the telegram were as follows:

1. *The original message as written by Primrose was most legible,* and its legibility is best authenticated by the fact which appeared in tracing its transmission, that it passed through a number of the Defendant's operators, exactly as originally written.

2. Primrose did not pay for a repetition, or insurance, of the message.

3. *Although partially in cipher, it was received by the operator at Philadelphia without protest, or without Primrose's attention being called to the printed words on the back of the blank.* This operator was aware of the nature of the business of Primrose.

4. *Primrose had never read the conditions on the Defendant's blanks, nor had his attention even been called to the same by any one at any time until after this transaction.*

5. The message, as originally written, after going through a number of offices on the way, was correctly received and transmitted as far as the office at Ellis, Kansas.

Here it was received by a young operator, 20 years old, and in whose office, or in the transmission to Waukeney, the next station, all of the errors occurred.

As shown by the deposition of this witness (pp. 68, 69 and 70 of Record), *this operator had had less than one year's experience, and that of a very uncertain and unsatisfactory kind.*

6. The weather upon that day, June 16, 1887, in the neighborhood of Ellis and Waukeney, Kansas, was all that could be desired. There was no atmospheric disturbance of any kind. To use the words of the witness (p. 19 of Record) it was "*a bright, beautiful day.*" The witness drove on that day in an open wagon from Ellis to Waukeney.

It is believed that the foregoing constitute all the facts pertinent to the consideration of the error assigned here.

As will be seen by reference to the opinion of the Court below, (p. 71 of Record), no doubt was entertained as to Plaintiff's having shown that he had sustained damage. The Judge says: "The consequences of the mistake are very serious and entailed "great loss on him." What, therefore, the Judge said to the jury (p. 74 of Record) in directing a verdict for Defendant, 'that there was no evidence upon which the Plaintiff could recover,' referred only to the question of the Defendant's negligence. All other matters of fact than the above, appearing in the Record, are thus believed to be foreign to the present issue before this Court.

SPECIFICATION OF ERROR.

The learned Court below erred in charging the Jury as follows:

"Gentlemen of the Jury, for the reasons just stated in your "presence the Court directs a verdict in this case for the Defen- "dants, there being no evidence before you upon which the "Plaintiff can recover."

ARGUMENT.

This is believed to be a case of first impression in the Supreme Court of the United States, as diligent search has failed to discover that the questions raised here have been before the Court upon any previous occasion.

As the decision thereof will not only naturally affect the Plaintiff, but as well the mass of the citizens of these United States in their daily business, the presentation of it to the Court is approached with much anxiety, and the considerations advanced in favor of the Plaintiff's position, are respectfully submitted with the earnest hope and belief that the result of the cause may truly subserve the rights of every citizen, individual or corporate.

As said by the trial Judge, *supra*, "the consequences of the "mistake were very serious, and entailed great loss on him," the Plaintiff.

SHOULD NOT THE EXTENT OF THE DEFENDANT'S RESPONSIBILITY FOR SUCH LOSS HAVE BEEN SUBMITTED TO THE JURY TO DETERMINE?

That is the only question for discussion here, as presented by the specification of error, and it is raised under singularly clear and simple facts, as detailed in the statement of the Case, *supra*.

Before approaching such facts, one or two propositions require consideration, as throwing light upon the general responsibilities of telegraph companies. It is earnestly contended,

First. THAT A TELEGRAPH COMPANY IS A COMMON CARRIER, AND SUBJECT TO THE LAW OF COMMON CARRIERS.

This is also a question never squarely before this Court, but the most recent decision upon the broad doctrine above pointed out, plainly indicates the trend of the Court in this matter.

This is in the case of DELAWARE & ATLANTIC TELEGRAPH AND TELEPHONE CO. *vs.* STATE OF DEL., *Ex. Rel.* POSTAL TELEGRAPH CO. U. S. Circuit Court of Appeals Rep. Vol. 3, p. 30. Part 10, Adv. Parts.

BUTLER, J., says therein:

"It is no longer open to question that Telephone and "Telegraph Companies are subject to the rules governing "Common Carriers and others engaged in like public employ- "ment.

"This has been so frequently decided that the point must be "regarded as settled.

"While it has not been directly before the Supreme Court of "the United States, cases in which it has been so determined "are cited approvingly by that Court in BUDD *vs.* NEW YORK, "143 U. S. 517.

"This case adheres to and confirms the Doctrine of MUNN *vs.* "ILLINOIS, 94 U. S. 113, which is the leading case on defining "the law relating to Common Carriers."

An interesting and able discussion of the principles sustaining this view is found in the following citation from

SHERMAN AND REDFIELD ON EVIDENCE.

"SECTION 554. The Courts have frequently discussed the "question, whether telegraph companies are or are not common "carriers, and it has been generally said that they are not. But "the language of the Judges in these cases was unnecessarily "broad, the real question before them being, at the most, whether "telegraph companies were subject to the strict responsibility of "common carriers of goods, a perfectly distinguishable proposi- "tion, which we shall presently consider. Moreover, in nearly "all these cases, judgment was finally rendered against the tele- "graph companies; and the opinions of the Courts were, there- "fore, expressed without that valuable restraint which arises "from a consciousness that the words used are really deciding "an actual controversy. We do not, upon the whole, think "that there is a single decision necessarily inconsistent with the "doctrine that a telegraph company is a common carrier of some "sort; while, in some opinions, which are framed with a clearer "perception of the difference between the two questions, the ap- "plicability of much of the law of common carriers to tele-

"graph companies is especially recognized. In the absence o "any controlling decisions upon this point, we feel at liberty to "express our own opinion that telegraph companies are common "carriers of messages, subject to all the rules which are in their "nature applicable to all classes of common carriers. . . .

"SECTION 555. Our reasons for the view we take are, in a "condensed form, as follows: A telegraph company always "undertakes a public service, and takes private property in a "way that can only be allowed on the plea of public use. This "makes it a carrier, if it is a carrier at all. If it did not serve "the public at large, it could not constitutionally erect a pole or "lay a wire without the consent of the land-owner. It receives "a written message, which it copies at a great distance by means "of electricity, and then undertakes to deliver this copy of the "message to the person to whom it is addressed. In making "this delivery it is literally a *carrier*, for the delivery clerk car- "ries a sealed envelope containing the message to its address. "If, as these companies claim, they are mere agents of the "senders of messages, in printing or sounding messages at the "end of a wire, then the message thus printed, or taken down "from the sound, is clearly the property of the sender, and the "conveyance of the message thereafter to its address is beyond "doubt a carriage of the sender's property. But even the trans- "mission of the message over the wire may fairly be called an "act of carriage. Something, however intangible, actually "passes over the wire. It is not, we admit, the paper on which "the sender wrote the message, but it is a substitute for that, "amounting in essence to the same thing. The whole value of "the paper consists in its ideas, and these ideas the company "undertakes to place at a distance, and does so by means of the "continuous transportation of a material substance."

It is submitted that this presentation of the position is unanswerable and it does not require further discussion here.

Second. BEING A COMMON CARRIER, A TELEGRAPH COMPANY CANNOT LEGALLY IMPOSE CONDITIONS UPON ONE WHOSE MESSAGE IT ACCEPTS FOR TRANSMISSION, RELIEVING ITSELF FROM

RESPONSIBILITY FOR DAMAGES TO THE SENDER, RESULTING FROM ITS OWN NEGLIGENCE.

As was said by the trial Judge in this case, the cases in the various State Courts where the decisions turned upon this proposition, are very numerous and look both ways.

More or less well-considered affirmative discussions of this proposition will be found in the following decisions of the State Courts:

N. Y., &c. Tel. Co. *v.* Dryburgh, 11 Casey (Penna. S. R.), p. 298.

Harris *v.* Tel. Co., 9 Phila., 88.

Koons *v.* Tel. Co., 12 Weekly Notes of Cases, 49 (Penna.).

Western U. T. Co. *v.* Tyler, 74 Ill., 168 ; 60 Ill., 421.

Western U. T. Co. *v.* Felton, 52 Ind., 1.

True *v.* I. T. Co., 60 Me., 9.

Bartlett *v.* W. U. T. Co., 62 Me., 209.

Hibbard *v.* W. U. T. Co., 33 Wis., 558.

Candee *v.* W. U. T. Co., 34 Wis., 471.

LaGrange *v.* S. T. Co., 25 La. An., 383.

Turner *v.* H. T. Co., 41 Iowa, 458.

W. U. T. Co. *v.* Marks, 49 Ind., 53.

Rittenhouse *v.* I. L. Co., 1 Daly (N. Y.), 474.

Careful and thoughtful discussions of these varied views are found also in the following extracts from the great text-books on Negligence, of Wharton, and Shearman and Redfield.

Says Mr. Wharton:

"Section 763. When telegraphy was first put in practice, the "inexperience of operators, the imperfection of instruments, and "the uncertainty, as it then appeared, of the new agency which "was invoked, produced a feeling that telegrams were to be re- "garded as exposed to so many aberrations that until they were "proved by a duplicate from the receiving office, their accuracy "could not be relied on. I cannot sue my printer for negligence "in minor details, so the position at first taken in this respect "may be illustrated, if I do not require from him a proof. For "a gross and patent blunder he is in any case suable; but for

"the negligences which would escape a proof-reader on the first "inspection he is not open to suit, if the custom among printers "is, as I know, only to bestow a final and minute examination "on revises, which are proofs having intermediately the benefit "of the author's corrections. Of course everything depends "upon usage, as understood by author and printer. If it is "understood that the printer gives the final corrections, then he "is liable for failure to give such corrections. If it is under-"stood that the author is to correct the proofs, then, if when op-"portunity has been given him to make such correction, he fails "to do so, he cannot recover for errors of the press such as "would not be likely to strike the eye of the printer on reading "the first proof. A similar view was taken on the first intro-"duction of telegraphy. For any absurd and preposterous blun-"der, such as an operator ought to discover at first sight, the "company would be liable. But for what might be called "latent errors there seemed at first no security unless the message "was sent back from the receiving office, and then revised, or "*proved*, by the sender. Hence the companies put into their "blank forms which were used by the sender, a condition that "they would not be liable for errors in a message unless it should "be repeated, and for repeating they charged half price. By "several courts this condition has been sustained.

"On the other hand, it has recently been argued with great "effect that in the present condition of telegraphy it is as easy "to telegraph from a fair copy as to write from a fair copy; "that when a blunder is made in telegraphing from a fair copy, "the company, in view of the vast public importance of accu-"racy in telegrams, should not be permitted to set up an agree-"ment by the sender releasing it from negligence; and that "this is eminently the case when the company occupies the "position of a public officer required by statute to perform a "particular duty. A public officer, it is argued, would not be "permitted to protect himself from liability for negligence by "an agreement with parties calling on him for official duty; a "telegraphic company should not be allowed to set up condi-

"tions virtually amounting to such a protection. And unless "it should be proved, (1) *that a custom of repeating exists as "well known as a custom of proof-reading, and* (2) *that an "opportunity of hearing the repeated message was given the "sender, it is a hard measure to impose upon him a condition "of which he had no actual notice, attached to a paper of which "no copy was given him, and which, from the exigency of the "case, he was obliged to sign rapidly.* Apart from this view, "a condition which relieves from negligence *in toto* is held "void, and this is a condition which relieves from negligence "*in toto*, and which, if operative at all, is operative in relieving "the companies, in the vast majority of cases, from all liability "for negligence. At the same time, the effect of such a stipu- "lation may be to throw the burden of proof of negligence on "the Plaintiff. We may therefore hold that such stipulations "when brought home to the sender, though not barring his "recovery, may impose on him, before he can recover, the duty "of proving *some degree of negligence* in the company."

"SHEARMAN & REDFIELD say:

"SECTION 558. The necessity of great condensation in the "composition of telegrams makes it a duty peculiarly impera- "tive upon every telegrapher to forward messages exactly as "they are sent. He is not responsible for the inability of the "receiver to comprehend them, no matter how unintelligible "they may be; while he will be responsible for any loss which "may be sustained by either the sender or the receiver of the "message, in consequence of his alteration of its terms from "those in which it was originally written.

* * * * * * * *

"SECTION 559. The sound rule of evidence, which puts the "burden of proof upon the party presumptively best acquainted "with the facts, requires that, in an action against a telegraph "company, proof that it received a message which it did not "properly deliver, or which it delivered in a distorted form,

"should be deemed sufficient to raise a presumption of negli-
"gence on its part, and to cast upon it the burden of proving
"that it used due care and diligence in transmitting the mes-
"sage. As a general rule, where an error is caused by atmos-
"pheric influences, or other causes beyond the control of the
"operators, they are aware at the time of the perturbation thus
"caused, and have it in their power to note the fact, as a pre-
"caution in case of future inquiries. They can tell, with won-
"derful accuracy, the place at which the wires are interfered
"with. They can and do keep the original message, and a copy
"of that which is received at the other end of the wire; and by
"a comparison of these, they can ascertain whether the error
"occurred in the electric transmission of the message. They
"have thus unusual facilities for disproving negligence, if they
"were not in fact negligent; and the Plaintiff, who is wholly in
"the dark as to all these matters, ought not to be called upon for
"affirmative proof in respect to them.

* * * * * * *

"SECTION 565. Among the rules which we consider highly
"unreasonable and unjust (if it is to be regarded as a 'rule' at
"all), is one which it has become usual for telegraph companies
"to make, exempting themselves from all liability for the non-
"delivery of unrepeated messages, and from any greater liability
"in respect to repeated messages, than for the mere repayment
"of the money paid for transmission. . . . Besides, the stipula-
"tion concerning repeated messages undertakes to relieve the
"company from all but nominal damages, so that in either case
"the sender of the message is deprived of all real relief unless
"he enters into a special contract of insurance (at rates which
"are purposely made so high that no one ever insures); and
"this, too, when the sender does not want any such guaranty as
"is implied in insurance, but only wants security for the use of
"reasonable care and diligence. We certainly think that such
"rules should be held void; and, being illegal in their terms and
"plain import, they ought not to be given effect, even in those
"cases which might lawfully be provided for, and which are

"covered by their terms. An agreement to cut off a man's head "would not be enforced even so far as it included cutting off his "hair; and no more should these rules, which aim at the nullifi- "cation of the law, be enforced in cases where they will not have "the full effect that was contemplated. . . .

"SECTION 567. *If we are right in holding telegraph compa- "nies to be common carriers of messages, it follows that they "have no power to restrict their duties or liabilities by a mere "notice, unless there is sufficient evidence of the assent of their "customers thereto to create a contract between them,* or unless "the provisions of the companies' charters, enabling them to "make rules and regulations under which messages shall be taken, "are sufficient to take them out of the general rule concerning "carriers."

Some additional and cogent reasons in support of proposition second are found in the following case:

HYER *v.* WESTERN UNION TELEGRAPH CO., 4 New Eng. Rep., 786–7.

THE COURT.

"The defendant claims its liability is limited to the amount "paid for the transmission of the message. It claims this limita- "tion on two grounds:

"I. The company relies upon a stipulation made by it with "the plaintiff, as follows: 'All messages taken by this com- "'pany are subject to the following terms: To guard against "'mistakes or delays, the sender of the message should order it "'repeated; that is, telegraphed back to the originating office "'for comparison. For this, one half the regular rate is "'charged in addition. It is agreed between the sender of the "'following message and this company, that said company shall "'not be liable for mistakes or delays in the transmission, or "'delivery, or for non-delivery of any unrepeated message, "'whether happening by negligence of its servants or otherwise, "'beyond the amount received for sending the same.' This is "the usual stipulation printed on telegraph blanks, and was

"known to the plaintiff, and was printed at the top of the paper "upon which he wrote and signed his message. He did not "ask to have the message repeated.

"Is such a stipulation in the contract of transmission valid as "a matter of contract assented to by the parties, or is it void as "against public policy? We think it is void.

"Telegraph companies are quasi public servants. They re- "ceive from the public valuable franchises. They owe the pub- "lic care and diligence. Their business intimately concerns the "public. Many and various interests are practically dependent "upon it. Nearly all interests may be affected by it. Their "negligence in it may often work irreparable mischief to indi- "viduals and communities. It is essential for the public good "that their duty of using care and diligence be rigidly enforced. "They should no more be allowed to effectually stipulate for "exemption from this duty than should a carrier of passengers, "or any other party engaged in a public business.

"This rule does not make telegraph companies insurers. It "does not make them answer for errors not resulting from their "negligence. It only requires the performance of their plain "duty. It is no hardship upon them. They engage in the "business voluntarily. They have the entire control of their "servants and instruments. They invite the public to entrust "messages to them for transmission. They may insist on their "compensation in advance. Why, then, should they refuse to "perform the common duty of care and diligence? Why should "they make conditions for such performance? Having taken "the message and the pay, why should they not do all things "(including the repeating) necessary for correct transmission? "Why should they insist on special compensation for using any "particular mode or instrumentality as a guard against their "own negligence? It seems clear to us that, having undertaken "the business, they ought, without qualification, to do it care- "fully, or be responsible for their want of care.

"It is true there are numerous cases in other States holding "otherwise, but we think the doctrine above stated is the true

"one, and in harmony with the previous decisions of this court. "TRUE *v.* INTERNATIONAL TEL. CO., 60 Me., 1; BARTLETT *v.* "WESTERN UNION TEL. CO., 62 Mo., 221."

The foregoing citations have been given *in extenso*, as it is believed they presented the true line of reasoning upon this most important subject, with much more lucidity of thought and with more weight of authority, than any words into which Counsel could have put it; and if they fail to make clear the two main propositions upon which Plaintiff in Error relies, he can add little or nothing for their strengthening.

While, as has been said, the mere questions raised here are on apparent first impression, yet this Court in the case of

WESTERN UNION TEL. CO. *v.* HALL, 124 U. S. p. 444.

more than impliedly recognized the foregoing principles, in the handling of the facts of that case in the course of its decision. Those facts were radically different from the ones in this case, but their consideration could hardly have been reached as it was, if the mind of the Court had not been at rest upon the above questions.

After discussing consequential and prospective damages and profits, Mr. JUSTICE MATHEWS says:

"Of course, where the negligence of the telegraph company "consists, not in delaying the transmission of the message, *but* "*in transmitting a message erroneously, so as to mislead the* "*party to whom it is addressed and on the faith of which he* "*acts in the purchase or sale of property*, the actual losses based "upon changes in market value are clearly within the rule for "estimating damages. Of this class examples are to be found "in the cases of TURNER *v.* HAWKEYE TEL. CO. 41 Iowa, 458, "and RITTENHOUSE *v.* INDEPENDENT LINE OF TELEGRAPH, "44 N. Y. 263; but these have no application to the circum- "stances of the present case."

As will be seen by reference to the opinion of the Trial Judge

in the Court below (pp. 71, 72 and 73 of Record), he expressed no personal opinion upon the question, but directed a nonsuit to be entered, which was altered to binding instructions to the Jury for Defendant, for the reason, as given by him, that the question had been twice before the Federal Circuit Courts, one case obscure and the other where the Judge had found the telegraphic regulations to be reasonable; and because of the importance of uniformity in the administration of law in these Courts, the Trial Judge stated that he felt constrained to follow what had been thus decided. He added (foot of p. 72 of Record) that he "did not find in the "case any evidence whatever of negligence except that which "appears from the change in the message in the course of trans- "mission."

This last dictum of the Court will be discussed later on in this Brief; at this point a brief consideration of the cases to which the Judge referred will be given.

The cases referred to were WHITE *v.* TELEGRAPH CO., 14 Fed. Rep. 710; JONES *v.* TELEGRAPH CO., 18 Fed. Rep. 717.

And, while the brief opinions or charges of the Judges in those cases present no valid reasons in opposition to the views heretofore presented, yet the facts of those cases differed so widely from the one now before the Court, that it is respectfully submitted they in no way control it.

In neither of the cases which have been relied upon by the Court below *was a non-suit granted, nor were the causes taken from the jury;* although in the case of JONES *v.* THE COMPANY, in 18th Fed. Rep., the jury were instructed that they could only find for the amount of the cost of the message multiplied by ten. This case we will first consider.

It is essentially different from the one now before the Court. There the message was a half-rate night message, and was distinctly found by the Court to have been sent under special conditions, to which the Court says the Plaintiff assented, viz., that the company should not be responsible for errors or mistakes, because it was a message at half-rates and sent at night; and while the presiding judge said that even such a contract as that

would not relieve the company from the results of its own gross negligence or fraud, yet the facts are radically other than those in the present case. No reasoning is given in support of the opinion of the Court, but attention is called to these words of the opinion: "*There is no evidence tending to show when, where "or how the mistake occurred, and the Defendant has shown that "it had suitable instruments and expert and skillful operators.*"

It is respectfully submitted, therefore, that this case is not in conflict with a decision in favor of the Plaintiff here, and that, on the contrary, the omissions pointed out by the Court there have been supplied here, and that if gross negligence would entitle the Plaintiff to a verdict under the circumstances of that case, it would naturally follow under the testimony in the present cause that a much slighter degree of negligence on the part of the Defendant was requisite to be shown.

In the case of WHITE *v.* THE COMPANY, 14th Fed. Rep., p. 710, attention is called to the fact that the question was there submitted to the jury under the instructions of the Court, and it was left for them to say what was the degree of the negligence, and it was not held by the Court as a *matter of law* that the cause must be withdrawn from the jury.

A few words will be said with reference to the substance of the charge of the judge in the last-mentioned case.

In the first place, the Court there says, but does not distinctly asseverate, that the Telegraph Company owes a high degree of care and diligence to the sender of the message. It says they owe *some degree* of care and diligence, and that the burden rests upon the Plaintiff to maintain the issue which he presents. The Court says (on page 714): "These are the two questions, "gentlemen of the jury, for you to determine," such questions being, 1st, whether the operators were grossly negligent or culpably careless; 2d, did they understand what the dispatch meant?

Then the Court proceeds to discuss the evidence of the Defendant in regard to climatic influences, insulation of wires, etc., and says (page 715): "These things of course should be con-

"sidered and given their proper weight, and it is for you to de-
"termine. You have heard the evidence on the other side that
"when the weather is clear and fair, and the line in perfect
"order, and the instruments all right, that nothing but unwar-
"ranted carelessness or gross negligence would result in an error
"of this kind. This is the testimony of the witnesses on the
"part of the defence. . . . Now was that error or mistake
"occasioned by reason of the difficulty on the line . . . or
"was it simply a matter of wanton carelessness or gross negli-
"gence on the part of either the operator sending or the oper-
"ator receiving this message? Gentlemen, you have to deter-
"mine this from the evidence in the case."

So that it is perfectly apparent from the foregoing citation that if the facts referred to by the judge are in the cause on the part of the Plaintiff, it is then a question for the jury to determine, and not for the Court, in the opinion of that judge.

In a foot-note upon this last case, the following intelligent criticism is found:

"But a common carrier is not permitted to get rid of its lia-
"bility for an act of negligence on its part by a contract or
"agreement with its customer. Neither and for the same rea-
"sons of public policy can a telegraph company escape liability
"for the consequences of the negligence of itself or its duly author-
"ized agents. Some courts, however, have restricted this lack of
"power to contract, to what is called gross negligence. A better
"rule however has been laid down in the majority of decisions,
"viz.: that notwithstanding a condition in the contract between
"the sender and the company, the latter will still be liable for
"mistakes happening in consequence of its own fault, such as
"want of proper skill or ordinary skill on the part of its opera-
"tives, or the use of defective instruments, but will not be lia-
"ble for mistakes occasioned by causes beyond its control, such
"as atmospheric changes, in the action of electricity, provided
"these mistakes could not have been avoided by the exercise of
"ordinary care and skill on the part of the operating agents of
"the company.

"The blanks of the Telegraph Company usually contain a

"condition that if the message is not repeated—for which ser-
"vice an extra charge is asked—the company shall not be liable
"beyond a certain small amount; generally the sum paid for the
"telegram or fifty times its amount. Such conditions are sus-
"tained as reasonable; but at the same time they are not allowed
"to exclude the company's liability for negligence. They are,
"however, a sufficient protection when the mistake or error is
"not due to the negligence of the company or its servants.

"6 Daly, 200; 45 Barb., 505: 6 Abb. Pr. (N. J.) 195; 45
"N. Y., 744; 1 Daly, 575; 35 Pa. S. R, 298; 3 Phila., 408;
"18 Md., 241; 1 Cal., 230; 37 Iowa, 214; 52 Ind., 1; 33
"Wis., 558; 3 Am. L. R., 777; 18 How., 157; 11 Neb., 87."

In DORGAN *v.* THE TELEGRAPH CO., Am. L. T. R. U. S., Vol. 1, 413, the following opinion is given by a Federal Judge, Woods, Circuit Judge:

"The telegraph company is engaged in a quasi public employment. Incalculable sums depend upon the alacrity, care and good faith which it brings to the discharge of its duties. The whole business of the commercial world is to a degree dependent upon it. The public has a right to exact at least ordinary diligence. A common carrier is not allowed to protect himself by contract from liability for the result of his own negligence. N. Y. CENT. R. R. CO. *v.* LOCKWOOD, U. S. S. C., Am. L. T. R. U. S., 21."

"There seems to be no good reason why the same rule should
"not be applied to a telegraph company. Shearman & Redfield
"on Negligence, Sect. 565; TRUE *v.* TEL. CO., 60 Maine Rep.,
"S. C. Allen's Telegraph Cases, 530; FISHER *v.* TEL. CO., 10
"Am. Law. Rep. N. S. 319; CAUBER *v.* TEL. CO., Am. Law
"Rep., vol. 8, p. 374.

The law as to the liability of common carriers has been so thoroughly settled by this Court that the Plaintiff will content himself with simply stating the proposition and the cases supporting the same.

"A common carrier cannot stipulate for exemption from the
"consequences of his own neglect or that of his servants."

HART *v.* PENNSYLVANIA R. R. CO., 112 U. S., 338; NEW

JERSEY S. NAV. CO. *v.* MERCHANTS' BANK, 47 U. S., 6 How., 344; YORK MFG. CO. *v.* ILLINOIS CENT. R. R. CO., 70 U. S., 3 Wall, 107; N. Y. CENT. R. R. CO. *v.* LOCKWOOD, *supra*; SOUTHERN EXPRESS CO. *v.* CALDWELL, 88 U. S., 21 Wall, 264; OGDENSBURG & L. C. R. R. CO. *v.* PRATT, 89 U. S., 22 Wall, 123; BANK OF KY. *v.* ADAMS EXP. CO., 93 U. S., 174; GRAND TRUNK R. CO. *v.* STEVENS, 95 U. S., 655.

Upon these general propositions heretofore discussed, and the cases upon which the Court below relied, it is felt that little more can be added.

In the cases in the State Courts which will doubtless be cited by the Defendant in Error, where the opposite view is taken, attention is called to the fact that very few reasons are advanced in support of the position, and that such reasons have little or no tangible weight.

Apart from all legal views of the subject, every consideration of natural justice revolts at the thought of binding a man by a contract which he has not read or which has not been called to his attention, specifically, and especially as in this case when the contract to which he is alleged to have been a party, is upon the back of the paper which he signed.

And it is respectfully submitted that the law of this land is, or should be, with reference to these matters, that—

I. WHERE A TELEGRAPH COMPANY, VESTED BY THE STATE WITH THE POWER OF EMINENT DOMAIN IN CONSIDERATION OF ITS UNDERTAKING A GREAT PUBLIC FRANCHISE, ACCEPTS FOR PAY FROM A CITIZEN A MESSAGE FOR TRANSMISSION, IT THEREBY BECOMES RESPONSIBLE FOR THE ACCURATE AND EXACT TRANSMISSION AND DELIVERY OF THAT WHICH IT RECEIVED, AND THAT IF THE MESSAGE WHICH IT DELIVERS DIFFERS FROM THAT WHICH WAS ACCEPTED BY IT FOR TRANSMISSION, AND DAMAGE RESULTS TO THE SENDER, THE PROOF BY THE SENDER OF SUCH ERROR PLACES UPON THE COMPANY THE BURDEN OF JUSTIFYING ITS NEGLIGENCE.

II. THAT SUCH COMPANY CANNOT SHIFT ITS RESPONSIBILITY AS SUCH COMMON CARRIER BY PRINTING

UPON ITS BLANKS, FURNISHED TO THE SENDERS OF MESSAGES, CONDITIONS EXEMPTING IT FROM LIABILITY FOR ERRORS AND MISTAKES IN THE TRANSMISSION OF THE MESSAGES, OR FOR ALL LIABILITY IN CIPHER OR OBSCURE MESSAGES, IF IT ONCE ACCEPTS THE MESSAGES AND RECEIVES PAY THEREFOR.

III. THAT SUCH COMPANY CERTAINLY CANNOT LIMIT ITS LIABILITY BY SUCH CONDITIONS, HAVING ONCE ACCEPTED A MESSAGE FOR TRANSMISSION, AND RECEIVED PAY THEREFOR, UNLESS IT SHOWS AFFIRMATIVE NOTICE OF THE CONDITIONS BROUGHT HOME TO THE SENDER.

But whether or not this Court is willing to affirm these or any similar propositions, it is respectfully submitted that in the case now before the Court, *it was plain error in the trial Judge to withdraw this case from the Jury.*

As shown by the statement of facts, the Plaintiff here took his message to an agent of the defendant company familiar with his business, and who knew that it referred to the purchase or sale of wool, and who, although a portion of the message was manifestly in cipher, accepted it for his employer without calling the attention of the Plaintiff to the conditions on the back of the blank that his Company claimed not to be liable, for errors in cipher or obscure messages.

The Plaintiff had never read these conditions, did not know of their existence, and had never had his attention called to them until after the error occurred.

The message was written with extreme legibility, and was safely and accurately transmitted through a number of operators and various changes until it reached its last station without an error of a letter.

Here a young and inexperienced operator, by some means, made four errors in its transmission for a short distance.

At the place where these errors occurred (Ellis, Kansas), the company's office was equipped with the most approved apparatus and the atmosphere was absolutely free from all disturbances.

The operator, who was an adverse witness, and of course anxious to clear himself, declared that he always exercised great care, although he had no recollection of this particular message, and that he was positive he made no mistakes. But the fact of the three mistakes actually occurring in his work was a complete answer to his statement, *and left the fact of his care an open question which a Jury alone could determine.*

In the following case the Court held that when 3 errors occurred in a telegraphic message containing 9 words that in itself was evidence of *gross negligence*

W. U. TEL. CO. *v.* CRALL, 38 Kansas, p. 679.

THE COURT: "Was the Telegraph Company guilty of gross "negligence? It is so found by the Court below, and we think "the findings are abundantly supported by the evidence in the "case. In a message containing 9 words besides the address "and signature of the sender there were 3 mistakes; it was sent "on Defendent's own line, on a fair day in which there was no "electrical or atmospherical disturbances. There was no good "reason, in the absence of atmospherical or electrical disturb-"ances, why the message should not have been transmitted ex-"actly as it was received. The art of telegraphy has been re-"duced to comparative exactness and certainty, and it was only "by the gross carelessness of the operator, or the culpable im-"perfections of the instruments and appliances of the Company, "that such a mistake would have been made in transmitting "the message so short a distance upon a calm, fair day.

"There is no testimony introduced in this case by the Defend-"ant Company and we presume the mere production of the "mutilated message would have been sufficient to establish the "gross carelessness of the Defendant.

"It would have thrown the burden of proof upon the De-"fendant, to excuse or explain its mistakes. (GRISWOLD *v.* TEL. "Co. 37 Ohio St, 301; RITTENHOUSE *v.* TEL. Co. 44 N. Y. "263; BALDWIN *v.* TEL. Co. 45 Id. 44; TEL. Co. *v.* KAREW, "15 Mich. 525; TEL. Co. *v.* WEEK, 49 Ind. 53; TURNER *v.* "TEL. Co. 41 Iowa, 458.) The Plaintiff did prove in addition

" that the weather was favorable for the use of Defendant's wires " and instruments.

"We believe that the findings of the Court were sustained by "ample testimony showing *gross negligence* on the part of the "Company, and that the contract urged as a defense by the De- " fendant is of no legal force whatsoever, when it is attempted " thereby to relieve the Company of its gross negligence."

Attention is also called to

W. U. TEL. CO. *v.* HOWELL, Id. p. 685.

The learned Judge of the Court below, here, in the face of foregoing facts, states: (p. 72 of Record): That he "does not "find in this case any evidence of negligence, except that which "appears from the change in the message."

That this opinion is an erroneous one, is respectfully but urgently pressed upon this Court.

It is admitted by nearly all of the Courts and cases passing upon the subject, that for gross errors the Company would undoubtedly be liable; that when a gross error had been committed, even the restrictive conditions would afford no protection, and the learned Judge here impliedly goes that far (p. 73 of Record).

But is there any reason for the drawing of such distinction? What is a gross error in such cases?

The Plaintiff in any case against a telegraph Company, is entirely without the means of showing how, or why, or when the mistake in a message occurred, excepting as he obtains such information from the Company or its employees.

All that he can possibly show, is that a mistake has occurred, somewhere and somehow occasioned by something which the Defendant had done or omitted to do.

The Defendant is bound to provide the best possible apparatus and the most experienced operators for its business. *It is a fact of which the Courts would now take judicial knowledge, that a telegraph Company can transmit with absolute accuracy any written message in any language by sound, each letter being indicated by dots and pauses (or dashes as they are called) in the working of the telegraph key.*

The WORD as such is not sent over the wire as a whole, but LETTER by LETTER. It is not written down by the instrument, but received by the operator by means of the sound and written by him upon paper as he hears it.

These facts are in evidence in this case as well.

There is therefore no reason for any error in the transmission of a message excepting through a mistake made by a negligent operator, or through some outside cause over which the Company had no control. *The clearness or obscurity of a message has nothing to do with its accurate transmission.* It would thus seem clear that the accurate transmission of a cipher message or word is a matter of no more difficulty than an ordinary message, and there can be no valid reason given in support of the arbitrary condition sought to be imposed by Defendant in the matter of such messages, other than what applies to ordinary words.

If a *letter* in a word is inaccurately transmitted, *apart from the question of outside influences*, the error must have come about either from a *negligent sign* by the *sending operator*, or from a *negligent hearing* by the *receiving operator*. And the Defendant in Error is challenged to assign other causes for the same, if any it can find.

In the present case, it was affirmatively shown that the message reached its last operator but one, with exactness—clearly showing how easy such accuracy was.

Then it suffered these changes. The absence of outside, disturbing agencies, was demonstrated by the Plaintiff in so far as he could be expected so to do, when it was shown that the atmospheric conditions at Ellis were perfect.

If any other outside influences affected the wires or the message, they are entirely within the knowledge of the Defendants, and may furnish good matter of a defence to the Jury.

What more could this Plaintiff be required or expected to furnish in establishing a case of negligence for the Jury to pass

upon? He had exhausted every means within his power to show how the mistakes occurred, and has shown facts entirely sufficient to warrant a Jury finding that the Defendant was guilty of gross negligence in the transaction. For under the telegraphic system an error in one word is as gross negligence as errors in twenty, legally speaking.

Every suggestion even, of the various cases, as to the character of evidence which the Plaintiff should produce, has been met. He has traced the message; shown where the errors occurred; all in one place by one man; that there were no atmospheric or outside difficulties; and certainly has raised the presumption of "some degree" of negligence, in addition to the negligence which we claim is to be inferred from the mere fact of the errors themselves. Four errors in one message is strong proof of something seriously wrong somewhere, and in itself, apart from any other consideration, should shift the burden upon the Defendants. The fact of damage resulting from only one of the errors does not alter the effect of the others upon the question.

It is therefore submitted that this case should not have been given to the Jury with binding instructions for the Defendant, and that the same should be sent back to the Court below for a new trial, when the Jury should be allowed to pass upon these questions.

JOSEPH DE F. JUNKIN,
GEORGE JUNKIN,
For Plaintiff in Error.

1154-b

IN THE

Supreme Court of the United States.

FRANK J. PRIMROSE,
Plaintiff in Error.

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

October 27, 1893.

The Brief and Additional Brief of the Defendant in Error having been received by Counsel for the Plaintiff in Error, within but a few days of the calling of the case, they venture to submit a hastily written Additional Brief in reply thereto, as many arguments and suggestions are made in such Briefs, which were not touched upon by the original Brief for the Plaintiff, and which arguments and suggestions, while extremely able and ingenious, and presented with great force, it is respectfully submitted, upon careful analysis and investigation, will be found to be both specious and misleading as to the law applicable to the cause before the Court, whatever may be their result as to the general questions involved.

AS TO VALIDITY OF REGULATIONS ON BLANK.

The argument for Defendant in both Briefs, and the Cases cited, largely base their defense of the reasonableness and validity of their regulations, upon the well-known rule, laid down in the leading Case of HADLEY *vs.* BAXENDALE, 9 Exch. 341, and which has been practically incorporated into the law of this land, as controlling the responsibilities of the Common Carriers of Merchandise and the baggage of Passengers.

The exact language of this case is as follows:

"Where two parties have made a contract, which one of "them has broken, the damages which the other party ought "to receive in respect of such breach of contract, should "be such as may fairly and reasonably be considered "either arising naturally, *i. e.*, according to the usual "course of things, from such breach of contract itself, or "such as may reasonably be supposed to have been in the "contemplation of both parties, at the time they made the con-"tract, as the probable result of the breach of it. Now, if the "special circumstances under which the contract was actually "made were communicated by the Plaintiffs to the Defendants, "and thus known to both parties, the damages resulting from "the breach of such a contract, which they would reasonably "contemplate, would be the amount of injury which would "ordinarily follow from a breach of contract under these "special circumstances so known and communicated."

This language evidently refers to Contracts where the facts or consequences were either known or could have been known, to either or both of the parties.

The argument of the Defendants, in their additional Brief, p. 13, is that, in the cases of messages delivered for transmission to a Telegraph Company, unless the exact meaning of the message and its purposes are made known to the Company, they can be held responsible in nominal damages only.

Curiously enough in the original Brief of the Defendants,

p. 13, they disclaim any right or desire to have the knowledge, or the right to know, as to their customers' business, claiming only, that if his message is of value to him, he should take out a special insurance for that purpose to the extent of such value, arbitrarily, without communication of its meaning or purpose; or that they are not responsible at all.

This apparent contradiction will be readily understood, it is submitted, when the suggestions hereafter advanced, are considered. The stress of the support of regulations clearly contrary to public policy, has forced the Counsel for Defendant into this odd position.

However, upon whichever of these bases the Defendant chooses to rely, in the view of the Plaintiff makes little difference.

The vice of the argument applying the rule in Hadly *vs.* Baxendale, as a measure of the responsibilities assumed by Telegraph Companies, is readily ascertained by the consideration of the *act* which the Telegraph Company undertakes to perform, under its public functions, and the consequences which flow from a wrongful or negligent performance of this act.

It contracts to transmit an IDEA, *not a* THING

In 999 cases out of 1000 of telegrams sent, this idea conveyed has no monetary value to either the sender or receiver. Neither of them has such thought in contemplation, and whether the message be a continuous English sentence, or disconnected words, or in some foreign language, written in Roman characters, there are no "*special circumstances*" to make known to the Company. The sender has the right to expect and require from the Company the careful performance of their duty, and the exact repetition to the Receiver of what he committed to them. There is nothing in the message which he wants guarded or insured, and he cannot as a matter of law, be assumed to suppose that the Company will change his message and subject him to consequences of which he never dreamed.

If such be the law, no one would be safe in sending any mes-

sage, clear or obscure, without taking out a policy of insurance —[for that is to what the insurance regulation of the blank is tantamount]—to guard himself in some imaginary amount for some imaginary injury, as to the extent of which he cannot even guess.

This is boldly submitted as the legitimate conclusion of the Defendant's position here, and it is believed that this view was not advanced to any of the Courts whose decisions have been cited as in support of the position.

It would be just as reasonable for railroad companies, as carriers of passengers, to lay down a rule that they would not be responsible for any injury to a passenger whom they undertook to carry safely to his journey's end, unless he paid them a special rate to secure compensation for injury arising from accident upon the road, and even then to be responsible only for the amount insured. Under the law, the passenger is not supposed to contemplate being injured under his contract. On the contrary he has the right to assume its exact fulfilment. Of course, as in the case of one sending a telegram, he knows that accidents may happen. He knows that human agencies are fallible, and machinery imperfect; but to require him to speculate upon this and take out a policy against all imaginary accidents to his limbs or life, or to pay a special rate for the performance of the Company's duty, which it undertook when it exercised the rights of eminent domain and became a public carrier, would be looked upon as a monstrous doctrine, intolerable by any Court in this land. Yet, it is submitted, that is just what in principle this Telegraph Company is asking here.

They say in their original Brief, that their wires and machines are not perfect, being made by human hands; that their operators are human and therefore liable to make mistakes; and that in a message, the apparent meaning of which they cannot understand, mistakes may more readily occur, as the operator may imagine he heard the wire sound out one word, when it in reality sounded another.

Is not the complete answer to all of this reasoning—*or rather*

plea for a judicial protection to be afforded to them which no other persons engaged in and vested with public functions have ever received—as follows: "You are not required to answer for errors not resulting from your own negligence. You are only required to perform your plain duty. You engage in the business voluntarily. You invite the public to entrust themselves to you. You are vested with public functions, and your measure of duty is very high. If you find that the rates charged by you do not adequately compensate you for the risks assumed, the remedy is entirely in your own hands. Charge such rates as the average of your losses show to be necessary. If you accept from the sender a message, and receive his pay therefor, your contract with him is to deliver to the person addressed exactly the words committed to your care and for which you have been compensated. You are accountable if you change his message in a way which he could not contemplate, for the damages which he suffers in consequences, unless you can justify your apparent negligence."

Is there anything more unreasonable, under the foregoing considerations, in applying such doctrines to a telegraph company, than in holding a railroad company primarily responsible for accidents to passengers, which the latter could not have forseen?

In the original Brief of Defendant, great stress is laid upon the fact that the rule in Hadley *vs.* Baxendale has been adopted in the cases as to *Common Carriers of goods*, and LORD MANSFIELD'S words in GIBBON *vs.* PAYNTON, 4 Burr, 2298, are quoted: "His warranty and insurance is in respect to the reward which he is to receive, and the reward ought to be proportioned to the risk."

Plaintiff does not for a moment contend this rule has not been properly applied to such common carriers; indeed such application is most reasonable, for the reason, as before mentioned, that what the carrier undertakes to do, is to transport a THING, *which has a definite recognized value, known only to the shipper*, and it would be most unreasonable to require the

carrier to be responsible for a concealed value, which the shipper could readily bring to the carrier's knowledge. The "*special circumstances*," mentioned in Hadley *vs.* Baxendale can be readily, and should be in good faith, communicated by the shipper to the carrier; otherwise the risk is disproportioned to the compensation, under the special circumstances.

So, also, the application of the rule to the responsibilities of railroad companies, carrying the baggage of passengers, especially where they transport it without additional compensation, is most reasonable, as is said by MR JUSTICE HARLAN in RAILROAD *v.* FRALOFF, 100 U. S. 24 [cited in Defendant's original brief, p. 8].

The average value of a passenger's luggage probably does not exceed the $100 or $150 limit, written on the ticket, and, if it does, the Company is entitled to "information from the passenger as to its value." And the limit of the liability of the Company for any loss, beyond this sum, seems to be most fair and reasonable.

Here is also a THING, of known value, and the *Railroad Company's* regulation places the situation, at time of contract, entirely within the power of the passenger to protect himself, if he wants or needs protection.

Such is not the case of a passenger, taking passage on a train for his own transportation, excepting, of course, that every man naturally places a high money value upon his own person. But the value is not ascertained, and if the Railroad Company had a regulation, printed upon the ticket which it gave to him, that it would not be responsible beyond the price of the ticket for damage to any portion of his person, unless he specially insured that portion, varying its rate according to the importance of the part injured, how helpless would the passenger be to determine what to insure! His only safety would always be the highest figure. And would not the necessary legal sequence result, that the Company's real transportation rate would be the premium charged for the guarantee of damages? For their duty and their contract is to carry safely, and compensate the passenger for damage occasioned

by their negligence, the consideration being the fare paid by him.

The regulation would therefore be void for that, if for no other reason, as it would be a mere evasion of their common-law responsibility. They are the parties to fix the common rate of fare for all passengers, which rate is to adequately compensate them for the unknown and possibly serious damages which they may be called upon to pay by reason of the uncertainty of the human agencies and machinery which they must use. *But, that rate once fixed and accepted*, they cannot escape responsibility by claiming that they had a higher rate which would have insured against the unknown danger.

The very statement of the proposition is its own best answer.

The assumption of just such unknown risks is in the very nature of the business which the railroad carries on, and such a palpable evasion of them would be entirely contrary to public policy and unreasonable to the last degree.

It is respectfully submitted that the same analogous reasoning applies with equal force to the duties and responsibilities of Telegraph Companies.

No better illustration could be found of the impossibility of the sender of a telegram protecting himself from loss by the disclosure of the meaning of his message, and special insurance, as required by the Company, and insisted upon in the Briefs. His message, as delivered for sending, was [p. 4, of Plaintiff's Brief]: "*Am exceedingly busy; I have bought all "kinds; 500,000 pounds; perhaps we have sold half of it; wire "when you do anything; send samples immediately, promptly "of purchases.*"

This was purely a telegram of *information*. It did not have a value ascertainable by any one. No insurance, excepting purely speculative, which is contrary to law, could have been made thereof. The consequences of the changes made by Defendant in this message were beyond the possibilities of Plaintiff's knowledge or imagination. There was nothing to disclose to Defendant nor any "*special circumstances*" to bring

the contract within the rule of Hadley *v.* Baxendale. As the message was delivered for sending, when the contract was made, there were no apparent risks for the plaintiff to run. The package had no known value.

The risks that arose were all of the Defendant's creation. Any special value that it had was placed upon it after it left Plaintiff's control, beyond the possibility of insurance, by reason of the errors made by Defendant in transmission.

That all may be so, say the Defendant, but you could have prevented the loss by having message *repeated* at a trifling cost.

As matter of fact, a repetition of the message to Primrose would not have availed anything, as his agent Toland at once drove off into the wild country, away from telegraphic communication, as the record shows, and in a few days had made all the purchases which caused the loss.

The argument of Defendant, upon p. 2 of Additional Brief, that if the message had been repeated the errors would have been at once detected by their operators at Ellis and Waukeeney, one of whom made the blunders, has no forceful application, as, if such was the purpose of repeating messages, to enable the operators to discover errors, and such a course is necessary by reason of the imperfectness of their service, repetition is eminently a duty which the Company owes to itself as well as the public, and the rate charged in the first instance should be sufficient to cover the repetition.

But apart from all this, if the considerations previously advanced as to the invalidity of the regulation as to insurance of messages are substantial and conclusive, it necessarily follows that the non-repetition of a message by the sender does not deprive him of his right to damages for a negligent sending, *because even when repeated, the liability admitted by the Company is a limited one*, and consequently unreasonable and contrary to public policy.

In this case how little protection would have afforded. The Company, in case of errors in repeated messages, limits its responsibility to not exceeding fifty times the price of mes-

sage. This message cost $1.15. Admitted responsibility, therefore, under most formidable condition of the regulations would be $57.50.

It is respectfully submitted that the limitation is equally unreasonable, whether the sum be $1.15 or $57.50. It is most earnestly urged upon the Court that the true light in which to view this regulation with reference to *repeated messages*, is that the same is but a palpable attempt on the part of the company to compel its customers to perform it own plain duty; and to evade responsibility under a sperious and illogical theory that it has different rates for different kinds of service, the results of each kind being different degrees of perfection, and that the Company is only liable under the higher rate and service, when as matter of fact, it is not substantially liable for its own negligence under either.

It often is a wise thing for a sender to have his message repeated, *for his own sake*, and the Company has a perfect right to charge for the service. But to claim that even then its responsibility is to be measured by the paltry sum of 50 times the cost of the message, it is earnestly contended, is both highly unreasonable and invalid. And after all, the repetition by no means insures accuracy, or prevents the mischief which a changed message may cause. Even if it comes back to the sender changed, it is but a warning to him that the mischief has been done, and may be beyond recall. He has a chance possibly to undo it, and retrieve himself—although he had none in this case—but by his additional rate has he not fully paid for his chance? And also, it might well happen that on the way back to him, the changes made to the receiver had all been rectified by errors made in repeating, so that he would receive the message just as he sent it.

Does not the whole question simply resolve itself to the proposition, that if the Telegraph Company thinks that there is no safety for itself excepting in repeated messages, then it should require the repetition of all messages, and make the charge for such messages the *standard rate*, having a special contract at a reduced rate for unrepeated messages, without liability, just as it does as to night messages?

It is again earnestly asserted in behalf of Plaintiff, that the regulation with reference to unrepeated messages not only is an invalid one for the foregoing reasons, but also has no application to the present case. because repetition would have been of no avail; and the Plaintiff was not under legal obligation to pay more than the fixed tariff to secure the highest measure of the Company's responsibility.

As to Defendant's argument concerning *cipher and obscure messages*, in addition to what is said in Plaintiff's original Brief, concerning the method of sending telegrams, letter by letter, not word by word, and that any errors must occur consequently either through negligence, or an outside cause, known to the Company, which they can prove in defense, attention is called to the argument by Defendant that the sounds or signals for "a" and "u" are very similar, and that therefore they ought not to be held responsible for the error in the present case.

A full answer to this is, that such matters are entirely within the Company's control. If they choose to use signals which may readily be misunderstood, that is their fault. They should for their own protection have unmistakable signals. The very using of signals so nearly alike almost, if not wholly, amounts to negligence. But a still more complete answer to the whole regulation concerning cipher messages, is found in their acceptance of the message for transmission.

They are under no obligation to accept cipher messages at regular rates; *but it is respectfully submitted that if they do accept a cipher message at regular rates in the usual course of their business, and accept the pay therefor, and they are negligent in the transmission of the same, they are responsible for the legal consequences.* This proposition does not require argument, as has been decided by this Court in EXPRESS Co. *vs.* CALDWELL, 21 Wall, 264 [cited in Defendant's Brief, p. 16], where it is said: "Telegraph Companies, like Common Carriers, cannot contract with their employers for

exemption from liability for the consequences of their own negligence."

AS TO PROOF OF NEGLIGENCE.

If the foregoing conclusions of the Plaintiff are sound and appeal to the Court, it follows that but one question would remain open in the consideration of the Plaintiff's case.

Were the Defendants shown to be negligent; or at least was the evidence such as should have been submitted to a jury to pass upon as to the fact?

The Defendant appears to have the idea that Plaintiff relies for proof of such negligence upon the bold fact that the word "*bay*" was altered to "*buy*." In this, the Defendant has misunderstood the Plaintiff's position.

It may be that simple proof of this one error would not have been sufficient to have shifted the burden. But when, as the evidence uncontradictedly shows, the message went without to within 17 miles of its destination, and on those 17 miles between operators suffered four changes, one of which was the substitution of one entirely new word for one originally written—"*Destroy*" for "*Despot*"—and it was testified by one of the Defendant's operators that there was a *vast* difference between the signals of 'these words'; and when in addition to that, it was shown that the instruments and machinery were of the best, and the atmosphere perfectly clear; it is felt by the Plaintiff that the case was one clearly for the Jury as to whether or not the errors occurred through the negligence of the operator. It is claimed by us that this shows *gross negligence*, and at the least, such negligence as only a Jury could pass upon.

This would appear to have been the opinion of MR. JUSTICE GRAY, when, as Chief Justice of Massachusetts, he cited with approval ELLIS *vs.* AM. TEL. CO., in deciding GRINNELL *vs.* WEST. UNION TEL. CO., cited by defendants in their additional Brief, p. 9, where the question of negligence arising from the

substitution of the word "seventy" for "twenty" was submitted to the jury.

What more was it in the power of the Plaintiff to prove?

The process of Defendant in sending the message is conducted in secrecy, so far as the sender is concerned. Naturally, its employees would claim that they did their work with care. Is not the only test to be applied to their fidelity, the result of such work? and if four glaring blunders are found in one short message, would not any jury be justified in holding that to be full evidence of negligence, even without the additional proof of the want of disturbing influences above referred to?

The Trial Judge has affirmatively found that the proof of the Plaintiff's loss was full, and that the distorted message was the proximate cause thereof. The record fully sustains this view, and there was ample to go to the jury upon that point.

It is therefore respectfully submitted, that upon every view of this case, the learned Court below was in error in giving binding instructions for the Defendant, and that the Plaintiff is entitled to a reversal.

JOSEPH DE F. JUNKIN,
GEORGE JUNKIN,
For Plaintiff in Error.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

Case No. 15,075

154-1

Term No. 59. October Term, 1894.

Supreme Court of the United S

Frank J. Primrose, Plaintiff in Error,

vs.

Western Union Telegraph Company, Defe
in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED S
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SILAS W. PETTIT,
For Defendant in Error.

GEORGE H. FEARONS,
JOHN F. DILLON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Frank J. Primrose, Plaintiff in Error,

vs.

Western Union Telegraph Company, Defendant in Error.

October Term, 1893.

No. 59.

BRIEF OF DEFENDANT IN ERROR.

COUNTER-STATEMENT OF CASE.

This action was brought by the sender of a telegraphic message for alleged negligence in the transmission of it.

The message was sent by Primrose, the plaintiff, on June 16th, 1887, from No. 62 North Front Street, Philadelphia, to his agent, Mr. Toland, at Ellis, Kan., but Mr. Toland having left there before the message was received, it was forwarded from Ellis to Waukeeney, Kan., where it was received and delivered to him about 8.30 P. M. of the day it was sent.

The exact routing of the message does not appear in the testimony, except that it was repeated from No. 62 North Front Street, Philadelphia, to the main office of the Western Union Telegraph Company in that city. It does not appear how often it was "relayed" between Philadelphia and Kansas City, but it does appear that Brookville, Kan., is a "relay" station on the line of the Western Union Telegraph Company west of Kansas City, and that the message in question was received there by operator Joseph Tindall, employed by the defendant company, who wrote out the message as received by him and delivered it to operator S. T. Stevens, who transmitted it to Ellis, Kan.; and that it was there received by

operator E. M. Smith, in the employ of the defendant company at that place, and by him—pursuant to Mr. Toland's instructions—repeated to Waukeeney, Kan., where it was delivered to Mr. Toland.

The message was a cipher message; that is to say, it was partly in cipher, and was wholly unintelligible to one not possessed of the key to it; and the following are copies:—

1. Of the message as written by Mr. Primrose and received by operator Stevens at Brookville, Kan.

2. The translation of it.

3. Of the message as received by operator E. M. Smith at Ellis, Kan., and by him forwarded to Waukeeney and delivered to Mr. Toland.

4. The translation of it.

1.

(Copy of message as written by Mr. Primrose and received by operator Stevens at Brookville. Record, page 62.)

"JUNE 16th, 1887.

"*To William B. Toland, Ellis, Kansas.*

"Despot Am exceedingly busy Bay all kinds Quo Perhaps Bracken half of it. Mince moment promptly of purchases.

"FRANK J. PRIMROSE."

2.

(Translation of above message. Record, page 12.)

"Your telegram of the 15th received; am exceedingly busy. I have bought all kinds, 500,000 pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately promptly of purchases.

"FRANK J. PRIMROSE."

3.

(Copy of message received by operator E. M. Smith, at Ellis, Kansas, on June 16th, 1887. Record, pages 4–5, 12.)

"Destroy am exceedingly busy Buy all kinds Quo perhaps Bracken half of it mince moment promptly of purchases.

"FRANK J. PRIMROSE."

4.

(Translation of above message. Record, pages 5, 16.)

"Your telegram of the 17th received; am exceedingly busy; buy all kinds; 500,000 pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately promptly of purchases."

The deposition of operator S. T. Stevens, who forwarded the message from Brookville to Ellis, and of operator E. M. Smith, who received the dispatch at Ellis, and forwarded it to Waukeeney, were taken, and each of them testified that the telegraphic equipment in their respective offices was good and in good condition, but neither could recollect the condition of the weather on that date, and each operator testified positively, the one, Mr. Stevens, that "I know that I transmitted both of those words as they appear upon the paper now before me, and that I did not transmit 'destroy' for 'despot' nor 'buy' for 'bay'" (Record, page 67); and the other operator, E. M. Smith, testified that the message was received by him by sound from the instrument, and written down by him as received, that the impression copy produced was made therefrom immediately thereafter, and that "I made no change between the message as received by me and this paper, but wrote it down word for word just as it was received."

There was no evidence offered to contradict or in any way qualify this testimony, nor to prove negligence on the part of the defendant company other than the fact of the error in the message itself; nor was there any testimony offered to show that either operator Stevens or operator Smith were not the competent operators each testified that he was; there was no evidence whatever that operator Stevens did not forward and transmit the message from Brookville exactly as he says he did, nor any evidence that operator Smith did not receive at Ellis the message exactly as he says he received it, and the record fails to show any evidence of negligence on the part of Stevens, Smith, or any other person, but shows only the fact that an error in transmission did occur.

While there is no evidence whatever as to how the error occurred, it does appear by the testimony of operator Scott, examined by the plaintiff, that the error by which the word "bay" was changed to the word "buy" consisted in the interposition of a dot, *i. e.*, that the letter "a" is transmitted by a dot and a dash, while the letter "u" is transmitted by two dots and a dash (Record, page 79), and that "it would be very likely that another dot could be put in if there was any interruption in the wire" (Record, page 42), and that the receiving of messages by sound instead of on a tape, as was done by operator Smith, is the approved system.

The record, therefore, shows no evidence of negligence on the part of the defendant, but, on the contrary, while it fails to show how the error occurred, does show affirmatively that the defendant company had taken every possible precaution to prevent such error by using proper electrical equipment and employing competent operators.

The only material error complained of is that the word "*bay*," which had no apparent meaning at all in the connection which it was used, but meant, according to the plaintiff's cipher, "I have bought," was changed, by the interpolation of a dot, into "buy," which had no cipher meaning, but did have an apparent meaning in the connection in which it was used and directly opposite to that which was the hidden significance of the word "*bay*," and the plaintiff claims that by reason of this change his agent bought for him three hundred thousand pounds of wool on a falling market, and it is for the loss on this that he seeks to hold the defendant liable in this action.

ARGUMENT.

The message in question was sent by the plaintiff in error upon a blank, upon the face of which, in conspicuous type, was printed the words:—

"Send the following message, subject to the terms printed on the back hereof, which are hereby agreed to."

Then follows the message, and at the foot of the face of the blank is printed:—

"Read the notice and agreement on the back of this blank."

Those terms were, so far as material in this case, as follows:—

"It is agreed between the sender of the following message and this company, that this company shall not be liable for mistakes, * * * in the transmission * * * of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, * * * nor in any case * * * for errors in cipher or obscure messages."

And one of the questions therefore presented by this record is whether such contract is valid and binding on the sender of the message, who has agreed thereto.

It is not deemed necessary to discuss in this case the question of whether or not such contract exempts the company from liability for delays in the transmission or delivery of unrepeated messages, or whether it relieves it from liability for the negligence of its servants if such negligence is affirmatively shown, because there is no allegation of delay, and as has been already stated, there was in this case no affirmative evidence of negligence at all, but, on the contrary, the defendant showed affirmatively that by furnishing and using proper electrical equipment and the employment of competent operators it had exercised due diligence in respect to the transmission of the message in question.

Although this question seems to be one of first impression in this court, it has been repeatedly decided by the appellate courts of many of the States, reference to some of which decisions will be hereafter made. Upon principle, however, it would seem that the case should present no real difficulty.

The communication of intelligence by electricity between cities, towns, and villages of the United States is conceded to be a public employment, and the telegraph company employed in that business to be an employé of the public in much the same sense as a common carrier.

But the very nature of the duty to be performed is so radically different from the transportation of passengers or merchandise that the rules of law which govern the one can

furnish an analogy only to a limited extent for the ascertainment of the rules which should govern the other.

As a matter of fact nothing whatever is transported. The paper containing the message intended to be sent, and delivered to the telegraph company for transmission, remains in the office at which it is received, and it is not intended, nor is it any part of the contract, that it should be removed therefrom, and the piece of paper on which is finally written the message which is delivered to the person to whom it is sent is not in any sense the thing which was delivered to the company for transmission, and the reasoning that in making delivery of this paper the telegraph company is a carrier because a boy or man carries an envelope containing a piece of paper to the person to whom it is addressed is fanciful and unreal.

The powers and duties of common carriers are in many respects *sui generis*. They spring from the nature of the common carrier's duty, the power which he has over the goods intrusted to him, the ability which the actual custody of the goods gives him to make safe transportation and delivery, the opportunities which this custody gives him for misconduct, the unequal relation of the parties, and the necessity to protect the shipper, who has committed the actual and exclusive possession of his goods to the carrier. Such is the *rationale* and basis of the strict liability to which the common law subjects the carrier in respect of the carriage and delivery of the goods. It makes him, subject to the acts of God and the common enemy, an insurer. The liability of the carrier as an insurer of the property carried is always connected with the custody of the goods.

Collis *vs.* Lamb, 11 Pa. St., 515.

There is, therefore, no real analogy between the case of a common carrier of goods actually intrusted to him and the case of a telegraph company employed to transmit the contents of a written message. Where the common carrier is a carrier of passengers the law is everywhere settled that he is not bound as in the case of goods as an insurer, but

only liable to use adequate care and diligence, and consequently is liable only on the ground of negligence.

Not only is the common carrier entitled to the custody of the goods, but he is entitled to a compensation based upon the nature and value of the service rendered and the risks assumed, including that of an insurer. And as on the one hand the carrier is bound to all the responsibilities of his employment, so on the other hand the settled and unquestioned law is that he is entitled to receive a reasonable compensation for his service based upon the cogency and extent of the duties required, and the nature and value of the service rendered, *including the risks incurred.* Accordingly, Lord Mansfield, in Gibbon *vs.* Paynton, 4 Burr., 2298, says:—

"His warranty and insurance is in respect to the reward which he is to receive, *and the reward ought to be proportioned to the risk.*"

Lawson on Carriers, section 86, says:—

"The liability of a common carrier being founded on his reward, he is entitled to give notice that he will not be answerable for valuable goods unless he is informed of their value."

S. P., per Bradley, J., in Railroad Co. *vs.* Lockwood, 17 Wallace, page 380.

The law is well settled that a carrier may require the value to be stated and charge accordingly.

In Hart *vs.* Pennsylvania R. R., 112 U. S., 331, 340, the court says:—

"As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting upon being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to

deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed." (Cases cited.)

In the case last cited the contract, signed by the shipper and fairly made, agreed upon a valuation of the property carried, with a rate of freight based on the condition that the carrier assumed liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, was upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

In Railroad Company *vs.* Fraloff, 100 U. S., 24 (where a Russian countess recovered $10,000 for the loss of lace carried as baggage), Mr. Justice Harlan says :—

" It is undoubtedly competent for the carriers of passengers by specific regulations distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability as insurers for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk. And in order that such regulations may be practically effective and the carrier advised of the full extent of its responsibility, and consequently of the degree of precaution necessary upon its part, it may rightfully require as a condition precedent to any contract for the transportation of baggage information from the passenger as to its value." (Page 24.)

In Magnin *vs.* Dinsmore, 70 N. Y., 410, the judgment given by the Court of Appeals in favor of the Adams Express Company goes still further. The court there held the following proposition :—

" That where a carrier by his contract limits his liability to a specified amount in case the value of the goods delivered for carriage is not stated by the shipper, if goods of greater value are so delivered, *silence* on the part of the shipper as to the real value, although there is no inquiry by the carrier and

no artifice to conceal the value or to deceive, is a legal fraud, which discharges the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract." "The disclosure of value in such case is a condition precedent to liability on the part of the carrier for mere ordinary negligence unaccompanied with any misfeasance or willful act. An omission upon the part of the carrier to make inquiry as to the value is not a waiver of the limitation in the contract."

The sender of a telegraphic message employs the telegraph company to communicate in writing to the person to whom and at the place to which it is addressed a message, which he writes and delivers to the telegraph company; presumably the sender is a long distance from the person to whom the message is sent, and in due course of business the fulfillment of the duty imposed and accepted by the telegraph company involves the writing and copying of the message many times.

In the simplest form the transaction stated in detail is that the message is delivered in writing at a telegraph office to an operator who transmits it by sounding on the key certain dots and dashes, which are reproduced—in a very large majority of instances accurately—to the ear of the receiving operator at the main office in that town, and who writes out the message word for word as he receives it.

This last operator then transmits it by striking on the key in his office to an operator stationed at the main office of the company in the place to which it is sent, who, in turn, receives it by sound and writes it out word for word as he receives it. He, in turn, transmits it in the same way to the sub-office nearest the place to which it is addressed, and the operator there writes it out as he receives it, and sends the paper to the person to whom it is addressed, thus involving, in almost the simplest case that can be imagined the copying four times of the written message delivered by the sender.

It is to be remembered that in each of those four instances the man who makes the copy can have no means whatever of comparing the copy made by him with the words intended to be sent except the message be repeated.

The transmitting operator sees the message he is sending and hears the sound of the key on which he is playing, but he cannot hear the sounds which the key he plays makes to the ear of the operator who receives it, nor can he see the written copy which the receiving operator writes. And, on the other hand, the receiving operator writing out the message as he hears it cannot see the message which the transmitting operator is reading, nor can he hear the sounds which the transmitting operator makes as he makes them. Given, therefore, the highest skill and most careful attention on the part of the transmitting and receiving operators, it is plain that neither can have the slightest protection against error or omission in the transmission, and that any disturbance in the wire by which the dots and dashes are intermingled, or that which was intended for two or more consecutive dots is made into a dash, or that which was intended for a dash is broken up into two or more dots, or a dot and a dash, must of necessity produce errors which cannot be detected unless the message is repeated.

The very nature of the service to be performed therefore shows how very distant and even fanciful is the supposed analogy between the duties assumed by the telegraph company and those assumed by carriers of persons or merchandise, and renders it entirely reasonable that the telegraph company should have the right to require the repetition of a message before it can be held liable for errors in transmission, unless its negligence is affirmatively shown. Where there is such a risk of error from causes wholly beyond the control of the telegraph company and of the happening of which it can, of necessity, have no knowledge, it is apparent that an error may well occur without any fault or negligence on its part, and that the mere happening of the error is of itself no evidence of negligence or want of care.

Again, telegraph companies, as all others engaged in public employment, are properly required to employ only competent persons in the transaction of their business; but it must be remembered that, of necessity, no man is always in the same condition of mental and physical vigor, and that any disturb-

ance of his health which dulls his hearing or impairs the delicacy and accuracy of his touch is certain to cause differences in his ability to receive or transmit telegraphic messages between different days, and even between different hours of the same day.

This element of uncertainty is inherent in the employé, and one against which no care or precaution, however vigilant, can effectively guard; and it would seem to be reasonable, therefore, that the company, and even the employé himself, for whose action the company is responsible, should be entitled to the protection of having at least one repetition of the message to guard himself against errors which, however competent he may ordinarily be, and however diligent and attentive he may have been on the particular occasion, are yet likely to happen.

Inasmuch, therefore, as from the nature of the duty to be performed, and of the means of communication adopted, and intended by both parties to be adopted for the transmission of the message, an error or omission may readily happen without negligence on the part of the telegraph company or its servants, it is a reasonable rule that the mere happening of an error or omission shall not, in and of itself alone, be deemed to be evidence of negligence.

Again, the character of messages sent over the telegraph wires vary enormously in their importance in a business sense. One man telegraphs another to meet him at dinner, while perhaps the next message involves the purchase or sale of valuable property, the quotation of values upon which large purchases are made, or the acceptance or rejection of a contract involving large sums of money. It is the business of the operator to send each message as it is received with equal accuracy and fidelity, but inasmuch as the chances of error are many it is only fair that some intimation be given of the value of the message and of the possible damage which may occur by reason of error in its transmission by the party who sends it, and who alone knows of its importance, and who can, by the payment of a trifling sum, not only guard against the happening of the error, but also put the company

upon notice that the message is important and that its transmission needs to be seen to with a care equivalent to the value of the intelligence communicated.

And it would seem to be equally reasonable that the company should have a right to refuse to be responsible at all for errors in cipher or obscure messages. In the first place, such messages in themselves are obviously more liable to be erroneously transmitted than messages written in language which can be understood by the person employed to convey it. While it is perfectly clear that no telegraph operator has the right to add or subtract letters from the words of the messages which he receives because to his understanding the message is unintelligble, but with his emendations becomes intelligible, yet it is apparent that when a message is written in everyday language the very fact that the message is unintelligible in some sort puts the operator upon notice that probably an error has occurred, and gives him an opportunity by "asking back" as to the particular word which he is in doubt about to detect and rectify an error if it has occurred, whereas this opportunity is wholly lost if the message in material parts is written in language which is evidently a cipher, and is intended to be obscure. Take the message in question for an instance. No operator could tell after he had received it in full whether "destroy" or "despot" was the right word, or whether "mince moment" were right words, although, had the message been written as intended to be read, he could have at once detected that something was wrong, that probably the message he had received was not that which was intended to be sent, and having thus been put upon his guard the error might have been detected.

And in respect to cipher and obscure messages, if the measure of damages announced in Hadley *vs.* Baxendale, almost universally followed ever since, and which has been adopted by this court, is the correct one, it is almost too plain to need argument that the telegraph company has the right to stipulate against being held responsible for any damages at all in respect to a message the importance of which it has no means whatever of ascertaining, and the very obscurity of which

adds enormously to the chances of error in the transmission of it.

It is a mere evasion of this argument to say that it is the duty of the company to transmit a message in the very language received, whether its employés understand it or not, and that, indeed, they have no right to seek to understand it, for all that is conceded. The company does not seek to understand its customers' business, and it does seek to deliver a message in exactly the words it receives it whether it understands it or not, but it would seem to be only reasonable that it should have the right to say that when the chances of error are increased by the intentional obscurity in which the sender has chosen to express the message he desires to send, and it is thereby deprived of all opportunity for discovering whether the message is of any importance, or is as idle as the words used would seem to show it to be, it will not be responsible at all, and that if one desires to send a message of business importance he must express it in such language that the employés handling the message may have some idea of its relative importance, and so be the more upon their guard against error or omission in transmitting it.

This very case in itself furnishes an instance of the justice of the company's contention here. The word "bay" made no sense in the message as sent, while the word "buy" did, and if the operator in receiving the message was at a loss to distinguish whether there were two dots or one, whether there was but one dot and a dash, or a dash apparently broken into by a previous dot, he would naturally incline to the belief and mechanically write out the letter which made sense and not that which made nonsense, and thus the chance of error was largely increased; and certainly no human ingenuity would *a priori* suppose that a man whose business was such that he used a cipher telegram at all would select a code by which "buy" meant "buy," but "bay" meant "I have bought."

And assuredly there can be no justice in a rule which would hold a telegraph company liable in many thousand dollars damages for an error in the transmission of a message which was apparently nonsensical, but which by the accidental change

of a single dot is alleged to have induced the purchase on a falling market of a large quantity of wool for future delivery.

It is therefore respectfully submitted that upon principle the nature of the duty which the telegraph company is employed to perform renders it eminently reasonable that it should be allowed to stipulate against liability for unrepeated messages, leaving it optional with the sender, by the payment of a trifling sum, to secure it against error and himself against loss by having the message repeated, *i. e.*, the message ready to be delivered to the person to whom it is addressed compared with that written by the person who sends it; and that the company has the right to stipulate that in no event will it be liable for a message couched in such language as to be wholly unintelligible, thereby increasing the chances of error and rendering it impossible for it or its employés to understand the purport or the pecuniary value of the message sent.

Accordingly it has been repeatedly decided by the courts of the States—

I. That the sender of the message is bound by the terms of the agreement under which the message is sent whether he has read it or not; that he is estopped from denying that he has read and acceded to it.

II. That the contract limiting the liability of the company for errors or omissions in the transmission of telegraphic messages unless they are repeated is a valid one, and the regulation of the company refusing to be responsible for errors or omissions in transmission unless it is afforded the protection of a repetition of the message is a reasonable regulation and one which the telegraph company had a right to make.

III. That telegraph companies have a right to refuse to be responsible for errors or omissions in the transmission of cipher and obscure messages.

And it is also submitted:—

IV. That even if the plaintiff is not bound by the terms of the agreement or condition under which the message was

sent, there was under the pleadings and evidence no error in the instruction of the court below to the jury.

I.

That the sender of a message is bound by the terms of the agreement under which the message is sent, whether he has read it or not; that he is estopped from denying that he has read and acceded to it.

Mr. Primrose, the plaintiff in this case, testified that he did not remember that he had ever read the printing upon the back of the telegraph blanks, and had no recollection of it at all up to that time, *i. e.*, the date of the sending of the message in controversy, but had read it since. (Record, folio 30.) He had previously admitted, however, that he did a great deal of business with the telegraph company, having a bill with the office for telegraphing amounting to $150 to $180 a month (Record, folio 29); that he wrote the message on a telegraph blank in his own office (Record, folio 28), and that he had either a bunch or a book of them there, and kept them conveniently near (Record, folio 30), and that a great deal of his business was done by telegraphing, and that he had been in the habit of telegraphing as long as he had been in business. (Record, folio 36.) It is submitted that he is bound by the contract indorsed on the blank.

Where the plaintiff did not present his claim for damages in writing within sixty days after sending the message, as provided in the contract printed on the telegraph blank, the court instructed the jury that he could not recover, saying:—

"He having signed these conditions it is therefore reasonable to presume that he was aware of them, and although most of them are inapplicable to this case if the defendant was guilty of gross negligence, yet there is one to which we think he was bound—we allude to that branch of the terms where the company declare they will not be liable for any damages in any case when the claim is not presented in writing within sixty days after the sending of the message, and

according to our views it was incumbent upon the plaintiff to show and prove that he had given such notice. Having failed to do so he cannot recover, and your verdict should be for the defendant."

To this instruction error was assigned, and the Supreme Court of Pennsylvania, per Agnew, J., say :—

"The paper itself is not deceptive, for though the terms are printed in small type, the attention of the customer is drawn directly to them by the heading and by the line printed between the date and the message itself. It is not the case of a mere notice, or of a ticket with limitations in small type, or so arranged as not to arrest attention. We cannot hold therefore that the court erred in saying that the plaintiffs, having signed the conditions, it is therefore reasonable to presume that they were aware of them."

The court also held that the condition requiring notice in writing within sixty days was a reasonable one, and the judgment was affirmed.

Wolf *vs.* W. U. Tel. Co., 62 Pa. St. Rep., 83, 84–87.

This case was cited with approval by this court in Express Co. *vs.* Caldwell, 21 Wall, 264, at page 270, in the following language :—

"Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf *vs.* Western Union Telegraph Co., a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within

sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition before he could maintain an action. Exactly the same doctrine was asserted in Young *vs.* The Western Union Telegraph Co., *34 N. Y. Superior Court, 390.*

In another case where the objection was made that the sender of the message was not bound by the terms printed upon the blank, the court says:—

"A party using such a blank and writing his dispatch thereon assents to the terms and conditions on which it is to be sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information."

Breese *vs.* U. S. Tel. Co., 48 N. Y., 139.

In another case where the same objection was made the court says:—

"It is immaterial whether the plaintiffs or their agent read the printed document or not. (Grace *vs.* Adams, 100 Mass., 505.) It is sufficient that they assented in writing to its terms and paid for the sending of a message not insured. The question here is whether the defendant is liable for the error, notwithstanding the agreement."

Redpath *vs.* W. U. Tel. Co., 112 Mass., 71–73.

In a case where the plaintiff testified, and there was no evidence to the contrary, that he had never read the conditions of the printed blank and was not informed of them, the Supreme Court of Michigan said:—

"This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind who should write a message upon the paper. He must

at least know that there is some printed matter on the face of the paper, and he must be held to know that it has been placed there for some purpose connected with the message. It is therefore no excuse for him to say that he did not read this printed matter before his eyes. It was gross carelessness on his part if he did not."

"The printed blank before the message was written upon it was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition and it became a contract upon those terms and conditions."

W. U. Tel. Co. *vs.* Carew, 15 Mich., 525–531–536.

And even although the telegraphic message is not written upon a blank with the condition or contract printed upon it, yet where it is shown that the sender of the message knew of the usual regulations printed upon the blank he is bound by them. In a case in Indiana the Supreme Court of that State says:—

"It is clear that the appellee had notice of the existence of the regulations of the company. He testified to this fact in his own evidence. It would seem that the intention of the company was that the party sending a message should write it on the same paper on which the regulation was printed, and under the same, and thereby expressly agree that the message was received, and to be sent under and in accordance with such regulation. In this case, however, the message was not written under such regulation, but was written on a business card, and handed to the operator or agent of the company when he was absent from the office. We are inclined to hold, however, that as the appellee knew of the existence of the regulations, and as the regulations themselves provide that no employé of the company was authorized to vary the terms of them, the appellee was as much bound by them as if he had written the message on the paper prepared by the company, and had thus assented to them."

W. U. Tel. Co. *vs.* Buchanan, 35 Ind., 429–435.

"It is immaterial whether Miss Melas read the printed matter or not.

* * * * * *

"I do not say, gentlemen, that Miss Melas was guilty of gross negligence in failing to inform herself of the contents of the printed form, but her want of knowledge, under the circumstances, is due to her failure to avail herself of the opportunity she had of obtaining the information, and she and the plaintiff, for whom she was acting, are chargeable with knowledge of what the printed form contained."

Beasley *vs.* W. U. Tel. Co., 39 Fed. Rep., 181–184.

"This telegraph company is not a common carrier, but a bailee performing through its agents a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government. The appellant is supposed to know that the engagements of the appellee are controlled by these rules and regulations, and does himself, in law, engraft them in his contract of bailment, and is bound by them."

Birney *vs.* Printing Tel. Co., 18 Maryland, 341–358.

"The sound and practical rule of law in such cases is that in the absence of fraud or imposition, a party to a contract which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the ground of his own negligence or omission to read it."

Womack *vs.* Telegraph Co., 58 Tex., 176–179.

II.

That the contract limiting the liability of the company for errors or omissions in the transmission of telegraphic messages unless they are repeated, is a valid one, and the regulation of the company refusing to be responsible for errors or omissions in transmission unless it is afforded the protection of a repetition of the message, is a reasonable regulation and one which the telegraph company had a right to make.

Where a message was sent from Parkersburg, W. Va., to Philadelphia, "I *hold* the Tibbs tract for you, all will be right," but which message was by error delivered, viz., "I *sold* the Tibbs tract for you, all will be right," through which error plaintiff was led to break off negotiations with an intended purchaser and lost a sale of the Tibbs tract, an action was brought against the telegraph company for damages for said loss. The message was sent upon a printed blank, bearing conditions substantially the same as those in question in this case.

The court reserved the question whether the defendants were liable, "the plaintiff not having insured the message, nor directed the message to be repeated," and there was a verdict for plaintiff, which the court below set aside, and entered judgment for defendants *non obstante veredicto.*

Hare, P. J., in delivering the opinion of the trial court, said:—

"The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes com-

mitted by his hand. It was also contended during the argument that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder storms and other natural causes. It is, therefore, obvious that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came.

* * * "We are, therefore, inclined to think that the regulation in question, or at least so much of it as has been considered in this opinion, is well calculated to reconcile the economy and dispatch which the mass of the community principally desire, with the security against accident which each individual is entitled to demand. But we limit ourselves to saying that it is not so far contrary to private interest or the public good as to justify a court of justice in pronouncing it invalid."

The Supreme Court of Pennsylvania affirmed this judgment upon the opinion of the court below.

Passmore *vs.* W. U. Tel. Co., 78 Pa. St. Rep., 238–243–245.

In another case, speaking of the reasonableness of the regulation requiring a repetition of the message, the Supreme Court of Michigan said:—

"But it would be extremely unjust, and, considering the small amount of compensation for sending a message, would effectually put an end to this method of correspondence, to hold them absolutely liable as insurers for the entire correctness of all messages transmitted, or to hold them responsible for all damages which might accrue from an error, especially when only a single transmission without repeating is relied upon or paid for, or to deny them all power by rules, regulations, or notices to limit their liability even in the case of repeated messages. And it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission.

"And while, in settled weather or when the normal condition or operation of the electric currents is not affected by any temporary or local disturbance, a single transmission by a skillful operator may be relied upon, as a general rule, and for matters of comparatively small importance, yet it must be well known to most men (if not to all who have such a degree of intelligence as to be likely to resort to this mode of correspondence) that the electric state of the atmosphere is liable to sudden and violent changes, extending over areas of greater or less extent, which cannot be foreseen or guarded against, and which materially affect the currents transmitted from a battery along the wires, and for a time render the operation of the instruments uncertain and unreliable; that those disturbances often affect distant portions of the line, or of a connecting line, while their influence may be scarcely felt, or not felt at all, at the station from which a message is sent, and that therefore to insure entire and uniform correctness the only safe method is to have the message verified by repeating it back to the station from which it was sent.

"The regulation, therefore, of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstances which may affect the question."

W. U. Tel. Co. *vs.* Carew, 15 Mich., 523–534.

The rule in South Carolina is the same.

"The regulation of the defendants, in conformity with which the terms of the contract limiting their liability was made, was a reasonable regulation, and such as the defendants were authorized to make."

Aiken *vs.* W. U. Tel. Co., 5 So. Ca., 358–371.

And so in Texas.

"That they can so limit their liability in regard to night messages, which are more subject to delays from natural and

other causes than would readily suggest themselves, would seem very reasonable, and particularly where the party who avails himself of that kind of message at a reduced rate does so voluntarily in preference to what is known as a day message. We fail to perceive on principle why in such cases the parties may not, as they did here, agree upon a sum certain in the nature of liquidated damages, for an error or delay arising from other cause than misconduct, fraud, or the want of proper care as above shown."

W. U. Tel. Co. *vs.* Neill, 57 Texas, 283–289.

So also in Missouri.

"We see nothing unreasonable in their declaring that they will not be responsible for unrepeated messages."

Wann *vs.* Tel. Co., 37 Mo., 472.

So also in Nebraska.

"The reasonabless of the rule thus recognized by the courts must be seen and acknowledged by all who give heed to the fact sworn to on the trial by several expert witnesses, and denied by none, that the only known means of reaching absolute accuracy in the transmission of messages by telegraph is by repeating them, that is, returning them to the office from which they were sent, for comparison with the original."

Becker *vs.* W. U. Tel. Co., 11 Neb., 87-92.

So also in Kentucky.

"There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible or to send it for a less price at his own risk. If the message be unimportant he may be willing to risk it without paying the additional charge. But if it is important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and

allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur."

Camp *vs.* W. U. Tel. Co., 1 Met. (Ky.), 164–168.

The rule is the same in California.

"With respect to the reasonableness of stipulations of the character of that under consideration, we find upon careful examination that according to the weight of authority a regulation that the liability of the company for any mistake or delay in the transmission or delivery of the message or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated, by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company, and we so hold."

Hart *vs.* W. U. Tel. Co., 66 Cal., 579–583.

In an action for an error in the transmission of a telegraph message which had not been repeated, and was sent subject to substantially the same conditions and contract as are involved in this case, the court said:—

"In view of the risks and uncertainty attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such service, which have been already alluded to, and also of the very extensive liability to damages which may be incurred by failure to deliver a message accurately, we think it just and reasonable that the conductor of the telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received at the request and expense of the parties interested, if they intend to hold him responsible in damages for any

mistake which may have taken place in the transmission of the messages. There is nothing in this regulation which tends to embarrass or hinder the free use of the telegraph, or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty. The repetition of a message may be unimportant. A mistake in its transmission might occasion no serious damage or inconvenience to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver rather than within that of the operator who transmitted it. The latter could rarely be expected to know what would be the consequence of an error in its transmission. It is therefore a most reasonable requisition that it should be left to those who know the occasion and the subject of the message, and who can best judge of the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render repetition necessary to ascertain its accuracy, instead of throwing this burden on the owner or conductor of the telegraph who cannot be supposed to know the effect of a mistake or the consequence in damages of a failure to transmit it correctly."

Ellis *vs.* American Tel. Co., 95 Mass., 226–236.

In a late case in New York the Court of Appeals of that State, speaking in reference to conditions on a telegraph blank substantially the same as those in the case now under consideration, say:—

"That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other States of the Union and in England. (Citing numerous cases.)

"The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents,

and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this State, and generally elsewhere, been upheld as reasonable. The plaintiff must be held to have assented to this stipulation. He was familiar with the defendant's blanks, having used them constantly for several years, and he had frequently read the words at the bottom of them: 'Read the notice and agreement at the top.' Therefore, although he may not have known what the precise terms of the stipulations contained in the blank were, yet he knew that some stipulations were therein contained, and he must be held by the use of the blank and its delivery to the defendant to have assented to them."

Kiley *vs.* W. U. Tel. Co., 109 N. Y., 231–236.

Where a message was sent upon a telegraph blank containing a stipulation substantially the same as involved in this case, and error occurred in the transmission of it for which the sender sought to recover damages, but which message was not repeated, and the court below left it to the jury to say whether defendant had used ordinary care and skill, the Supreme Court of Iowa said:—

"This instruction holds in effect that the plaintiff is entitled to recover upon showing, with other matters which need not be mentioned, that the defendant's employés made the mistake shown in the pleadings and evidence; that the condition of the contract for the transmission of the message relieved the defendant of liability for mistakes occurring from uncontrollable causes, but did not exempt it from liability for the negligence of its employés; and that the burden of proof rests upon the defendant to show that the mistake occurred from uncontrollable causes. This instruction in this regard is in conflict with the doctrine announced by this court many years ago, and ever since recognized, in Sweatland *vs.* Ill. & Miss. Tel. Co., 27 Iowa, 433. The condition of the contract for transmission of the message in that case was substantially like the one involved in this. This court then held that

'The plaintiff to recover must prove something more than a mistake and damage. He must show that the mistake was caused by the fault of the defendant, and that it might have been avoided if the defendant's instruments had been good ones, and if the defendant's agents had possessed the requisite skill, and exercised proper care and dilligence in respect to the transmission and receipt of the message in question.'

"The instruction above quoted not only imposes liability upon the defendant upon simple proof of a mistake, without evidence of negligence, but imposes upon the defendant the burden of proving that there was no negligence, for the reason that the mistake occurred through uncontrollable causes. It makes the defendant liable without proof of negligence, and does not permit escape of liability except upon proof made by the defendant that there was no negligence. The instruction is not only in conflict with the prior decision of this court, but is clearly wrong in principle."

Aiken *vs.* W. U. Tel. Co., 69 Iowa, 31–35.

Upon the same principle, where the action was for failure to deliver a message written upon a blank containing the usual condition, the Court of Appeals of Maryland say:—

"The appellee by requiring the message to be repeated could have assured himself of its dispatch and accurate transmission to the other end of the line if the wires were in working condition; or by special contract for insurance could have secured himself against all consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message. And having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through in order to fix liability on the company."

U. S. Tel. Co. *vs.* Gildersleeve, 29 Md., 232–248.

Where the action was for damages for non-delivery of a half-rate, *i. e.*, night message, the conditions of which are

substantially the same on the blank in question in this case, the Circuit Court of the United States in Arkansas, in an opinion by Caldwell, J., said:—

"It is sufficient to say that the weight of authority and the ablest and best reasoned cases establish the doctrine that the conditions contained in the blank on which the plaintiff wrote his message, and to which he assented, are reasonable and valid to the extent of protecting the telegraph company from damages for any error or mistake occurring in the transmission of the message, unless it is shown affirmatively that such error or mistake was the result of gross negligence or fraud on the part of the company; and that mere proof of the fact that there is a mistake of a word or a figure in the message is not sufficient evidence of negligence or fraud to render the company liable beyond the amount stipulated for in the contract of the parties."

Jones *vs.* West. Union Tel. Co., 18 Fed. Rep, 717, 718 1883.

Where through error in transmitting a message the word "sail" was changed to "rail," in an action brought for damages resulting therefrom, the Supreme Court of Missouri said:—

"Whether we regard telegraph companies as common carriers or as bailees, we see no reason why they may not specially limit their liabilities, subject to the qualification, however, that they will not be protected from the consequences of gross negligence. Deny them this right, and they will be utterly unable to protect themselves against the hazards and risks which are incident to the business in which they are engaged. We see nothing unreasonable in their declaring they will not be responsible for unrepeated messages. We think this description of liability comes within the intention of the regulations provided for in the statute. The system of telegraphing, however perfect it may be, is seriously affected by atmospheric causes, which are uncontrollable, and if a man wants to send a message of an important character prudence and wisdom would seem to dictate that

he should have it repeated, in order to be assured of its correct transmission; and as the repetition imposes additional labor it is surely justice that an enhanced price should be paid."

Wann *vs.* West. Union Tel. Co., 37 Mo., 432.

Many other cases might be added on this point, but it is believed that enough have been cited to show that the great weight of authority in the courts of the States is in favor of the proposition that the telegraph company has a right to require that a message be repeated if it is to be held liable in damages beyond the amount stipulated for in case of error in transmission, and that the conditions printed on the telegraph blank are valid and binding whether they are considered as a contract between the parties or as a regulation imposed by the telegraph company as a condition of its acceptance of the message.

III.

That telegraph companies have a right to refuse to be responsible for errors or omissions in the transmission of cipher and obscure messages.

This rule, or a practically analogous one, to wit, that the measure of damages for error or delay in the transmission and delivery of cipher messages is merely nominal, has been frequently before the courts and is upheld in most of the States. Not only is there much greater liability to error in the transmission of a cipher message because of its intentional unintelligibility, which of itself would seem to justify a telegraph company in refusing to transmit such message unless exempted from liability for probable errors, but the company has no means whatever of estimating the consequences of error in transmission or failure to deliver, and therefore the damages which may accrue from such error or delay are not those which are reasonably within the contemplation of the parties within the rule announced in Hadley *vs.* Baxendale, 9 Exchequer, 341, and which is entirely applicable to actions for damages against telegraph companies.

Where a delay occurred in the transmission of a cipher message whereby the plaintiff lost certain commissions, for which damage he brought suit, the court said :—

"The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message in words by themselves entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendants, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby a considerable profit which they would otherwise have made by the transaction. The action was for negligence in not transmitting the message, the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain a verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in Hadley *vs.* Baxendale, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in Hadley *vs.* Baxendale applies, and that the damages recoverable are nominal only."

Saunders *vs.* Stuart, L. R., 1, C. P. D., 326–328.

Even where a message was not in cipher but the words used did not give notice of the importance of the message, the Supreme Court of Minnesota held that the plaintiffs were entitled to recover only the tolls they had paid. The message was, "Dispatch received. Will take 200 extra mess at prices named," and of this the courts says :—

"The message purports to relate to some business transaction, the nature of which is not disclosed. It gives no intimation of the magnitude or importance of the business in-

volved, or of the amount of damage that might result from a delay in transmitting it. The company might have known from the tenor of the message that it related to a purchase of goods, and was presumably of some value, but the message itself, 'Will take 200 extra mess at prices named,' would hardly have informed the defendant of the nature, quantity, price, or value of the goods which the plaintiff offered to take. The damage the plaintiff might suffer from a rise in the market price of pork if this message were not seasonably delivered could hardly have entered into the contemplation of the defendant at the time it received and undertook to transmit this message, as a probable consequence of the breach of its contract."

Beaupre *vs.* Pac. & At. Tel. Co., 21 Minn., 155–161.

Where a message was sent, "Sell fifty (50) gold," which was not delivered to the person addressed, and an action was brought by the sender against the telegraph company for the failure to transmit, the Court of Appeals of Maryland said:—

"But by the latest and best considered cases upon the subject the rule seems to be now pretty well established that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary or ordinary result of the breach can be supposed to have been so contemplated unless full information be imparted to the party sought to be held liable at the time of entering into the engagement. This is the rule furnished by the case of Hadley *vs.* Baxendale, * * * and applying it to this case the prayer of the appellee which was granted is clearly incorrect, for while it was proved that the dispatch in question would be understood among brokers to mean $50,000 of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell 50 gold' may have been understood in its literal import if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as $50,000 by those not initiated.

And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury we think the court committed error, and that its ruling should be reversed."

U. S. Tel. Co. *vs.* Gildersleeve, 29 Md., 232–249–251.

And in a very similar case the same rule of decision was applied by the New York Court of Appeals.

Lowery *vs.* Telegraph Co., 60 N. Y., 198.

Where a cipher message was sent as a night message, which was not delivered, and thereby the sender suffered loss, the court held that under the circumstances of that case the condition printed in the blank did not exempt the telegraph company from liability, but in respect to the measure of damages the court says:—

"We are of opinion that the plaintiff is entitled to recover no more than nominal damages, or, as specified in the regulations, the amount paid for transmitting the message. There appears to be no division of opinion among the courts that in contracts of this class the measure of the damages to be recovered for the breach is the same as that which obtains in actions upon contracts in general, the rule for the assessment of which has ever been regarded as correctly expressed in the leading case of Hadley *vs.* Baxendale. * * * In this case the message was in cipher, its meaning wholly unknown to the operator, and no explanation given of its true character and import."

Candee *vs.* W. U. Tel. Co., 34 Wisc., 471–479, 480.

Unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it on behalf of the telegraph company no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose.

Mackay *vs.* Tel. Co., 16 Nev., 222.

Where plaintiff sent a telegraph message in cipher and did not disclose its meaning to the company only nominal damages, or the price which was paid for transmission, are recoverable in case of mistake on the part of the company.

Tel. Co. vs. Martin, 9 Ill. App., 587.

For failure to deliver, or for delay in delivery, of a cipher dispatch a telegraph company is liable only in nominal damages.

Daniel vs. Tel. Co., 61 Texas, 452.

Where there was an error in the transmission of a cipher message the Supreme Court of California held that the price paid for the transmission of the message was the limit of the liability.

Hart vs. Tel. Co, 66 Cal., 579.

"Aside from the reasons which support the rule of damages in Hadley *vs.* Baxendale, there is here a question of public policy to which we could not shut our eyes if we were in doubt upon the question. Under any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it or a total failure to deliver it, the door is open to unlimited fraud upon the company.

"The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They can construct any meaning which they may choose, and upon the meaning thus constructed they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit."

Abeles *vs.* W. U. T. Co., 37 Mo. App., 554–560.

And the same rule has been adopted by the Circuit Courts of the United States:—

"It would be unjust to the telegraph company to hold it responsible for damages without limitation when it is not informed by the dispatch itself or otherwise that the sender might sustain heavy loss unless the message be transmitted and delivered immediately or without delay. * * * But if you find there was nothing on the face of the dispatch to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and yet you find that the company was negligent, then you will find against the defendant for nominal damages only." Per Gresham, J.

Behm vs. Tel. Co., 8 Bissell, 131–133.

IV.

Even if the plaintiff is not bound by the terms of the agreement or condition under which the message was sent, there was under the pleadings and evidence in this case no error in the instruction of the court below to the jury.

The ground of the defendant's alleged liability, stated in both counts of the declaration, is negligence. To this declaration the defendant pleaded not guilty, thereby putting all the material allegations of the complainant in issue, and of course casting on the plaintiff the burden of proof to establish the alleged negligence. The plaintiff offered no evidence of such negligence—none whatever. On the contrary, as appears in the statement of the case which precedes the present argument, evidence was produced which negatived any negligence, or want of due care on defendant's part, that is, evidence tending to show that the cause of the error in the transmission of the dispatch in question was owing to atmospheric causes or other causes inherent in the nature of the service, and against which it is impossible for the company to guard, except by repetition of the message; and in the case of cipher or obscure messages difficult, if not impossible, to detect even when the same are repeated. This shows the reasonableness of the

rules contended for under the preceding points of this brief, which we do not here repeat. Under these circumstances the court, after the testimony was all in, instructed the jury as follows:—

"GENTLEMEN OF THE JURY:—For the reasons just stated in your presence, the court directs a verdict in this case for the defendant, there being no evidence before you upon which the plaintiff can recover."

This was right, for the case was destitute of evidence showing any fault or want of care on the part of the defendant. The plaintiff could either have entirely avoided or materially diminished the risk of error by complying with the regulation of the company to have the message repeated at the trifling expense of fifty per cent. of the cost of transmitting the original message—a mere trifle. (Record, page 63.) He and he alone knew the importance of the message. The circumstances of the case appearing in the evidence make it destitute of all equity as against the company, certainly as against the alleged claim for an enormous amount of damages, and which claim under the contention of the plaintiff is one which it is not within the reasonable power of the company to avoid. Much of what might be said on this point has been anticipated under the preceding points. It will suffice here to state that on the general principle of the law of *torts*, the plaintiff failed to establish any actionable wrong on the part of the defendant. For it is a fundamental proposition that a plaintiff, seeking to recover damages for the wrongful act of a defendant, must establish, first, such wrongful act; second, that such wrongful act directly, and without any intervening cause, produced the damages complained of.

"You must have, in our law, injury as well as damage."
Pollock on Torts, page 106 (Am. Ed.).

Addison on Torts (American Edition), page 2, thus states this elementary doctrine: "To constitute a *tort*, two things must concur, actual or legal damage to the plaintiff, and a wrongful act committed by the defendant," which wrongful

act caused the damage. "Negligence does not of itself create a cause of action unless it amounts to a breach of duty."

Applying these principles to the case at bar, the plaintiff not having repeated the message, we contend that the plaintiff's case directly falls within the numerous cases referred to under the preceding points of this brief; that the plaintiff, in order to recover, must in such case prove something more than the mistake in the message and the damage resulting therefrom. He must show that this mistake was caused by the fault of the company, otherwise he fails to establish the *gravamen* of the alleged cause of action, to wit, neglect and want of care on the part of the company. The doctrine on this point laid down by the Supreme Court of Iowa in the case of S wetland against the Illinois and Mississippi Telegraph Company, above referred to, supported by a long line of decisions in the various States, above quoted, we insist is sound and reasonable, to wit:—

"The plaintiff not having directed the message to be repeated, it is incumbent on him to satisfy the jury that the mistake was caused by the defendant's negligence, and would not have occurred had the defendant's agents used proper care in the transmission and receipt of this particular message." 27 Iowa, 458.

Besides which, the evidence shows that the alleged mistake was not the cause of the damage of which the plaintiff complains.

It is respectfully submitted, therefore, that the judgment of the court below is sustained by principle and authority, and that it should be now affirmed

SILAS W. PETTIT,
For Defendant in Error.

GEORGE H. FEARONS,
JOHN F. DILLON,
Of Counsel.

154-1

IN THE

Supreme Court of the United States.

FRANK J. PRIMROSE,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

Additional Brief for Defendant in Error.

SILAS W. PETTIT,
JOHN F. DILLON,
GEO. H. FEARONS,
For Defendant in Error.

RUSH TAGGART,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

In the Supreme Court of the United States.

FRANK J. PRIMROSE,
Plaintiff in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

The argument of the plaintiff's brief (which we had not seen when our main brief was written) proceeds upon the theory that the record in this case undisputedly shows that the operator at Ellis, Kansas, was guilty of the mistakes by which the word "bay" was made to read "buy," and also the other changes in the message. The testimony does not warrant any such conclusion as this. This message was received at the repeating office at Brookville, Kansas, by operator Tindall, and sent from there by operator Stevens (Rec., p. 67). It is true it was received in the form in which it was sent from Philadelphia, but a mistake or mistakes could just as readily be made in sending it from Brookville as in receiving it at Ellis. It is true Stevens says he sent it as received by him from Tindall (Record, p. 67). But so, also, Smith at Ellis says he received it as sent, and transmitted it in like manner (Record, p. 68). There is no record whatever of the dots and dashes made by Stevens at

Brookville, nor of the action of the sounder from which Smith spelled out this message at Ellis. All the record we have is the result at Ellis as written out by Smith. In the light of the testimony of these witnesses for the plaintiff it is manifestly impossible to determine the cause of the errors complained of in the message. Certainly it would be as just an inference from the testimony to say that Stevens was the cause of the errors as to say that Smith was. However, a more convincing illustration of the propriety of the defendant's rule requiring repetition of messages to avoid mistakes in transmission it would be impossible to imagine. Suppose the operator at the destination of this message to have been required by Primose to repeat this message. Smith at Ellis would have had his copy for comparison, with the message as repeated, and so in turn Stevens at Brookville would have compared the message as taken by Smith from the wire at Ellis, with the copy in his possession at Brookville, and the changes, however caused, would have been detected in an instant.

The necessity of repetition to prevent mistakes which are otherwise unavoidable, and inherent in this mode of transmission, is shown by the methods adopted by railroad companies in sending advices to trains by telegraph. It is to be noted in this connection, that such messages are not in cipher but are expressed plainly and simply, and made as short and concise as is possible. They follow fixed forms and are clearly intelligible to the operator receiving, as well as the operator sending them. No railway company would permit such orders to be transmitted in cipher. If so transmitted in cipher and a mistake occurred, the very fact that a blind or

jargon message was used would be imputed to the the company as a fault. In addition to this, the appliances for moving trains are of the best, in view of the interests involved. Yet, notwithstanding all sethe favorable conditions, the chances of interference and mistake are such that every well managed railroad invariably requires every order to trains to be repeated for the express purpose of insuring accuracy, and guarding against such errors as occurred in this case —viz., the omission of a dot or dash, or the addition of a dot—thus changing some one letter or figure, which may change the entire meaning of the word. We produce herewith the printed rules on this subject of a large railroad company, being the same in use upon all the railroads of the country, and adopted by representatives of all such railroads in a convention called for the purpose.

Rules for the Movement of Trains by Telegraphic Orders:

"507. An order to be sent to two or more offices must be transmitted simultaneously to as many practicable. The several addresses must be in the order of superiority of rights of trains, and each office will make only its proper address. When not sent simultaneously to all, the order must be sent first to the train having the superior right of track.

"508. Operators receiving orders must write them out in manifold during transmission and make the requisite number of copies from one writing, or trace others from one of the copies first made.

"509. When an order has been transmitted, preceded by the signal '31,' operators receiving it must (unless otherwise directed) repeat it back at once from the manifold copy, and in the succession in which their several offices have been addressed. Each operator repeating must observe whether the others repeat correctly. After the order has been repeated correctly by

the operators required at the time to repeat it the response 'O. K.,' authorized by the train despatcher, will be sent simultaneously to as many as practicable, naming each office. Each operator must write this on the order with the time, and then reply 'i i O. K.,' with his individual and office signal.

Those to whom the order is addressed must then sign their names to the copy of the order to be retained by the operator, and will send their signatures to the superintendent. The response 'complete,' with the superintendent's initials, will then be given when authorized by the train dispatcher. Each operator receiving this response will then write on each copy the word 'complete,' the time and his last name in full, and will then deliver a copy to each person included in the address, and each must read his copy aloud to the operator.

"510. For an order preceded by the signal '31,' 'complete,' must not be given to the order for delivery to a train of inferior right until 'O. K.' has been given to and acknowledged by the operator who receives the order for the train of superior right. Whenever practicable, the signature of the conductor, engineman and pilot of the train of superior right must be taken to the order, and 'complete' given before the train of inferior right is allowed to act on it.

"After 'O. K.' has been given and acknowledged, and (Rules for movement of train) by telegraphic orders, Rule 510, continued.) before 'complete' has been given, the order must be treated as a holding order for the train addressed, but must not be otherwise acted on until 'complete' has been given.

"If the line fails before an office has received and acknowledged 'O. K.' to an order preceded by the signal '31,' the order at that office is of no effect, and must be there treated as if it had not been sent."

[The above is extracted from a book herewith shown whose title page is as follows:]

RULES

FOR THE GOVERNMENT

OF THE

TRANSPORTATION DEPARTMENT

OF THE

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, LEASED AND OPERATED LINES.

To Take Effect January 1, 1891.

Martin B. Brown, Railroad Printer,
206 and 208 Fulton St., New York.
1891.

The necessity of repetition to avoid mistakes is still more urgent in the case of a message composed as this was of arbitrary words with no meaning in their connection with each other. The operator, having only dots and dashes, expressed by the clicking of the electrical sounder, interspersed by pauses of greater or less duration, translates them first into letters; then, remembering the letters, puts them together into words. It needs no argument to demonstrate that in this complicated process he is greatly aided by a natural collocation of words expressing some meaning. In the case of cipher messages the operation is purely an act of memory of arbitrary signs. In the case of such messages, the inherent weakness of the system of telegraphic transmission and the liability of the operators to misinterpret sounds is greatly increased, and the

chances of detecting any error or mistake is not only greatly lessened, but almost destroyed.

It is in view of the inherent weaknesses of the system of telegraphic communication—weaknesses that no degree of skill and care or mechanical device will remove, that the Courts, English and American, have recognized the injustice of a rule, which in its operation would make the telegraph companies practically insurers of the accuracy of the transmission of messages, and have affirmed the reasonableness of a rule or regulation requiring repetition of messages to guard against mistakes. Thus in McAndrew vs. Electric Telegraph Co., C. B., Vol. 17, p. 13, as early as the year 1855, the question was presented, and the Court adjudged the company's regulation as to repetition of messages to be a reasonable and valid regulation. JERVIS, C. J., thus discusses the subject:

"Now, in the present case, we are not called upon to determine whether the whole and every part of the condition which the company thought fit to impose is reasonable, although my brother BYLES was warranted in referring to the whole for the purpose of illustration. All that we have to decide is, whether or not that part of the condition upon which the defense in this rests is reasonable within the 66th section of the act [which authorized the company to make reasonable rules and regulations]—viz. 'The company will not be re-'sponsible for mistakes in the transmission of unre-'peated messages, from whatever cause they may arise.' So far from that being, as my brother BYLES suggests, an unreasonable qualification or limitation of the company's liability, it seems to me to be perfectly just and reasonable that means should be afforded to the company for ascertaining by repetition the correctness of the translation of the message delivered to them for transmission. The ground upon which it is suggested that this condition is unreasonable, is, that it goes on to negative the liability of the company for mistakes in *repeated messages*, unless they be insured; and it is argued that it would be impossible in many cases to

estimate the probable loss or damage to be insured against. If, however, there be any weight in that argument, it would operate to the exclusion of all contracts of insurance; and the result would be, that the company would be left without the means of protecting themselves in any case against those risks which are necessarily incident to the business which they carry on, and would become—what it is not pretended that they are—general insurers against loss arising from casualties over which they have no control. The difficulty—or, it may be, the impossibility—of estimating accurately the risk to be incurred is an infirmity necessarily incident to the nature of the subject matter of the contract. I see no reason, therefore, why the company should not be allowed to avail themselves of the same sort of protection that other persons in a similar position are by law entitled to do, by limiting their liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with them. For these reasons I am of opinion that the nonsuit ought not to be disturbed."

The question was again before the English Courts in Playford vs. United Kingdom Telegraph Co., L. R., 4 Q., B. 706, 1869. The condition printed on the message blank in that case is as follows:

"In order to provide against mistakes and more effectually insure delivery, every message of consequence ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged, in addition, for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor the non-delivery of unrepeated messages, from whatever cause arising, either upon its own lines or those of any other company or government, which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of a repeated message to any extent above £5, unless it be insured at the rate of £1 per cent."

In the course of the discussion on the argument, the

Chief-Justice made the following very considerate and pertinent observations, page 442:

COCKBURN, C. J.: "There is a distinction, illustrated in the cases as to carriers, between mere casual mistakes, such as may well happen in the manipulation of such a delicate instrument as the electric telegraph and such as arise from gross and egregious negligence. And though it might be reasonable that the company should protect themselves from the consequences of casual mistakes, it might be most unreasonable that they should have immunity for injuries caused by the grossest want of care, as, for instance, by having persons to manage the telegraph utterly incompetent or unfit."

* * * * * *

The judgment of the Court of Queen's Bench in this same case (COCKBURN, C. J., LUSH, HANNEN and HAYES, JJ.) was delivered by LUSH, J., who said *(Ib.*, p. 454*)*:

"As we are against the plaintiff on the first point, it is unnecessary to give any opinion upon the second. The obligation of the company to use due care and skill in the transmission of the message is one arising entirely out of the contract. There is nothing in the special act which affects their relation, either to the sender or the sendee of a message, or makes it different from what it would have been had no Act of Parliament been passed. We cannot agree with the judgments given in the American courts in the cases cited in the arguments, that there is any analogy between a consignment of goods through a carrier and the transmission of a telegram. We cannot see how the person to whom a telegraphic message is sent can be said to have a property in the message, any more than he could have had if it had been sent orally by the servant of the sender."

The doctrine laid down in the MacAndrew, case, *supra*, that the regulation as to repeating of messages is a reasonable one; has never been changed in England either by the Courts or by Parliament, and it is to-day the law of that great commercial country.

The American cases cited in the brief of the defendant decided by the Courts of twelve States and several Federal Courts, lay down the same doctrine.

The Supreme Court of Massuchusetts in two cases in addition to those cited in our main brief had the question under consideration; viz., in Grinnell vs. Western Union Telegraph Co., 113 Mass., 303, A. D. 1873, and Clement vs. Western Union Telegraph Co., 137 Mass. 463, 1884.

In the case of Grinnell vs. Western Union Telegragh Co., GRAY, C. J. thus discusses the reasonableness of this regulation (p. 302):

"The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for pending it, unless the sender orders the message to be repeated by sending it back to the office which first rereceived it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company. Ellis vs. American Telegraph Co., 13 Allen, 226; Redpath vs. Western Union Telegraph Co.. 112 Mass., 71; Camp vs. Western Union Telegraph Co., 1 Met. (Ky.), 164; Western Union Telegraph Co. vs. Carew, 15 Mich., 525; United States Telegraph Co. vs. Gildersleeve, 29 Maryland, 232; Breese vs. United States Telegraph Co., 48 N. Y., 132."

"Such a regulation does not undertake wholly to exempt the company from liability for loss; but merely requires the other party to the contract, if he considers the transmission and delivery of the message to be of such importance to him that he proposes to hold the company responsible in damages for a non-fulfillment of the contract on its part, beyond the amount paid for the message, to increase that payment by one-half. Even a common carrier has a right to inquire as to the

quality and value of goods or packages intrusted to him for carriage, and is not liable for goods of unusual value, if false answers are made to his inquiries (Phillips vs. Earle, 8 Pick., 182; Dunlap vs. International Steamboat Co., 98 Mass., 371, 377, 378).

" In the leading case in this Commonwealth of Ellis vs. American Telegraph Co., the action was brought for an error in transmitting a message, by substituting the words " seventy-five " for " twenty-five ; " and there was no evidence of carelessness or negligence, except this error, which was made by some agent of the company in transmission. The defendants requested the Judge who presided at the trial to instruct the jury that, on these facts, they were not liable. But the Judge ruled that, notwithstanding the terms and conditions set forth in the printed heading of the message (which were substantially like those in the case at bar), the defendants were bound, in transmitting the message, to make use of ordinary care, attention and skill, and were liable for damages arising from inattention or carelessness in such transmission, and not produced by any unexpected or unforeseen accident; and that the difference between the message received and that actually delivered was *prima facie* evidence of the want of ordinary care, attention and skill on the part of the part of the defendants (13 Allen, 226-228). * * *.

"Although that action was by the receiver of the message, he was treated throughout the case as claiming through the contract, of which he had notice, made with the company by the sender of the message. No allusion was made in the judgment of this Court to the nature of the error in the message, or to its effect as evidence of negligence on the part of the company. Nor was it suggested that there was any insufficiency in the proof of negligence; and there was nothing before this Court upon which such a point could have been decided; for the question whether the substitution of " seventy " for " twenty " was or was not of itself proof of negligence depended upon the plainness of the writing of the original message, which could only be ascerfained by inspection, and which was a pure question of tact to be determined by the jury or the court below.

" As the instructions at the trial of that case did not allow the plaintiff to recover without proof of negligence to the satisfaction of the jury, the judgment of this Court, sustaining the exceptions to those instruc-

tions, is a direct adjudication that the regulations in question exempted the company from liability for ordinary negligence where the message had not been repeated and the additional charge paid. We have been led to make the fuller statement of that case, because its scope and effect appear to us to have been misapprehended in Sweatland vs. Illinois & Mississippi Telegraph Co., 27 Iowa, 433, which is the only decision cited at the bar inconsistent with the law upon the subject, as declared by this Court.

In the case at bar the form of the dispatch delivered by the defendant's agent to the plaintiff, and filled up and signed by the latter, constituted the contract between the parties. The plaintiff, having thus expressly agreed that, if he did not order the message to be repeated, the liability of the defendant for mistakes or delays in its transmission or delivery should be limited to the sum paid, and not having ordered it to be repeated and paid the increased rate required in case of repetition, could not charge the defendant for liability, beyond the amount originally paid for the transmission of the message, for a mistake in the transmission, at least without proving willful default or gross negligence on the part of the company.

" There was no offer at the trial to show any wanton disregard of duty or gross negligence on the part of the company or its agents. The offer to prove that ' there was negligence on the part of the operator,' in not sending the whole message received, must be understood to mean want of ordinary care. No question therefore arises whether the company could be charged, by reason of gross negligence, as held in United States Telegraph Co. vs. Gildersleve, 29 Maryland, 232, and suggested in Ellis vs. American Telegraph Co., 13 Allen, 226, 234."

The rule is followed and approved by the same Court in Clement vs. Western Union Telegraph Co., *supra*. The plaintiff's counsel in their brief seem to consider the question as presented one of entire exemption from responsibility, but that is not the contention of the defendant. The contention of the defendant is that when a party comes and employs it to send a message, and does not order it repeated, that the defendant only

assumes a liability in such case equal to the amount paid for transmission. The validity of this contention is fully upheld by Hart vs. Penna. R. R. Co., 112 U. S., 331, and other cases cited in our main brief. Parsons speaking of the regulation as to repeating messages says, "The rule is certainly very reasonable" (2 Parsons on Contracts, 6th Ed., p. 257*f*).

Cipher Character of the Message.

The plaintiff's counsel do not, in their brief, consider the question of the propriety of the Court's action, in view of the cipher character of this message. They seem to treat the question of damages in the same manner as if this message had fully disclosed upon its face its full import and meaning.

This Court, in Howard vs. Stillwell Mfg. Co. (139 U. S., 206), has fully approved the rule of damages laid down in the leading case (Hadley vs. Baxendale, 9 Exch., 341), viz., only such losses as flow naturally from a breach of a contract, can be recovered, and when there are special circumstances, under which the contract is made, they must be known to both parties, in order to make the damages resulting therefrom the measure of recovery in case of a breach.

This doctrine is firmly adhered to in England, and is illustrated in the later case of Cory vs. Thames Iron Works and Shipbuilding Co., Limited, L. R., 3 Q. B., 181. The defendants agreed to sell and deliver to plaintiffs, within a certain time, the hull of a floating boom derrick, but they did not deliver it until six months after the specified time. The plaintiffs, who were large coal merchants in the port of London, purchased the hull in order to place in her large hydraulic cranes and ma-

chinery for the purpose of transhipping coal direct from the colliers into barges. The hull was the first vessel of the kind ever built, and the plaintiffs' special purpose was entirely novel and unknown to the defendant. The defendant believed that the plaintiffs were purchasing the hull for the purpose of using her as a coal store. If the plaintiffs had been prevented using the hull for their special purpose, they would either have sold her to be used as a coal store, or would have used her themselves as a store; and this was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade. Had the hull been purchased for this purpose, the delay in the delivery would have occasioned loss to the amount of £420. The plaintiffs actually suffered damage to a much larger amount from not having the hull ready for their special purpose at the time fixed for the delivery. It was held in this case that the plaintiffs were entitled to the £420, as the damages which the defendant must be taken to have contemplated would result from the non-performance of their contract.

In the case of this cipher message, it was the duty of the Court below to apply this rule. The value of this message, its meaning, the special circumstances under which it was sent, and its purposes, were unknown to the defendant. The rule in such case is clear that only nominal damages could be recovered. This point has several times been adjudged.

"When the import of a telegraphic message is wholly unknown to the company's agent to whom it is delivered for the transportion, it cannot be assumed that he had in view, any pecuniary loss as the natural or probable result of a failure to send such message; and in such case, upon breach of a contract to transmit

and deliver, the sender can recover only nominal damages, or the amount paid for the sending of the message."

Candee vs. Western Union Telgh. Co., 34 Wis., 471.

In Daniel vs. Telegraph Co., 61 Texas, 452, the rule is thus stated:

"The damages given by way of indemnity have been the natural and necessary consequences of the breach of contract in the minds of the parties interpreting the contract in the light of the circumstances under which it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach."

In Mackay vs. the Western Union Telegraph Co., 16 Nevada, 222, BELKNAP, J., thus defines the liability of the telegraph company for a cipher message:

"The only loss which followed, as a natural consequence from defendant's breach of contract, was the money paid by plaintiff for the transmission of the message, and this is the limit of the damages he is entitled to recover under the facts presented. Although the question herein considered has never before been adjudicated by this Court, the decisions of the Courts of other states uniformly sustain the principle, that, unless the importance of the message is shown, either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in the transmission beyond the price paid for that purpose."

Such, also, is the law of England.

Sanders and others vs. Stuart, L. R. C. P. Div., Vol. 1, p. 326.

The head note of that case is as follows:

"The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted the defendant with a message

in cipher, which was unintelligible to defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiffs lost a sum of money which they would have earned for commission upon an order to which the message related:

Held, that the plaintiffs could not recover such sum of money from the defendant, but only nominal damages."

The opinion of the Court we give in full. It is as follows (p. 327):

"Lord COLERIDGE, C. J.: The plaintiffs in this case were merchants in this country; the defendant, a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiff for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction.

"The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in *Hadley vs. Baxendale*, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in *Hadley vs. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second

portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be "reasonably supposed to have been in the contemplation of "both parties at the time they made the contract as "the probable result of the breach of it," for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can "fairly and reasonably be considered as arising naturally, *i. e.*, "according to the usual course of things from the "breach" of such a contract as this. No rule as to damages which is to be found in any of the cases, or in the books of Mr. Sedgwick and Mr. Mayne, will avail the plaintiffs in this case; and the cases cited to us from the American Courts in which the liabilities of common carriers have been imposed on telegraph companies in America, even if correct with regard to telegraph companies, have no application to a case where the defendant is not a telegraph company, but a collector of messages to be transmitted by such a company, and the negligence complained of is his negligence, and not the negligence of a company. We think, therefore, that the rule should be absolute to reduce the damages to a nominal sum."

Discussing this subject of cipher messages, and the liability of the company in respect thereof, a late text-writer says:

"A class of cases now presents itself, in which the message which the company contracts to communicate does not disclose upon its face a single factor apprising the company of the position that the employer will probably occupy through the performance of the contract. The damages recoverable for the breach of a contract to communicate a message of this description are simply nominal.

"In two or three early cases the doctrine has been advanced that a telegraph company is liable to its employer for the actual and proximate loss that he sus-

tained through the breach of a contract to communicate a message intelligible to the person addressed, although the company was entirely ignorant, when it made the contract, of the meaning of the message. This doctrine is rested, it seems, upon two grounds—one that it is not necessary that the parties to a contract should have contemplated the actual and proximate loss likely to ensue in case of a breach, if only they could have contemplated it upon inquiry; the other, that a contract between a telegraph company and its employer—a contract in which the swift delivery of intelligence is obtained at such expense—in itself discloses the importance of the contract, and the loss that is likely to ensue in case of a breach. But neither of these grounds is tenable. The former is clearly opposed to the well-settled rules for the assessment of damages in actions of contract generally. The latter, if more specious, is in reality equally unsound. A telegraph company knows that the actual loss that the employer is likely to sustain through the breach of a contract of this description *is* the equivalent at least, in pecuniary valuation, of the price paid for the communication of the message; since it is certain that, if this were not so, it would not have been employed. But it does not know that that loss is the equivalent of any greater sum. Aware that the message, although apparently meaningless, will be intelligible to the person addressed, the company knows furthermore that the actual loss that the employer is likely to sustain through a breach of contract *may be* any loss. Knowledge of this description is the necessary consequence of total ignorance. But ignorance of the actual loss likely to ensue from a breach of contract—ignorance so great as in itself to give rise to knowledge that the actual loss may be any loss—cannot be deemed the equivalent of full and complete knowledge of that loss. Evidently a company, knowing only that the actual loss likely to ensue from a breach may be any loss, cannot reasonably contemplate out of all losses the one actually sustained. It cannot reasonably contemplate any particular loss. The chances are all but one against that loss. Now, where a telegraph company breaks its contract, it is liable, in accordance with the general rules, for the loss that it might reasonably have contemplated as likely to ensue from a breach. As it cannot in this class of

cases reasonably contemplate any particular loss as the one likely to ensue, it is liable for a breach only in nominal damages."

Gray on Communication by Telegraph, Sec. 87.

The defendant is authorized by statute of New York where it was chartered to establish rules and regulations for transmitting dispatches.

Act of New York, April 12, 1848, Chap. 365, Sec. 11.

Act of New York, April 19, 1855, Chap. 559, Sec. 11.

SILAS W. PETTIT,
JOHN F. DILLON,
GEO. H. FEARONS,
For Defendant in Error.

RUSH TAGGART,
Of Counsel